

1878-003 Chancery Causes: Wheeler & Ball] vs. Charles Peyton & Co
Lee Co

Wheeler, Ball, Swap, Orr, Howard, Bedford, Newlee, Divine, Peyton,
Slaughter, Greer, Demontmor, Peyton & Swap], Ely, Brown, Miller,
Shumate, Newberry, Mosier, Gully, Snellen, Harbison, Patton,
Wyerman, Wiernan, Davis, Hopkins, Gibson, White, Thompson, Mills

CA-Debt

T-Property
Business

Additional Information:

Iron works

To the Honorable John A. Kelly Judge of the
Circuit Court of Lee County Virginia:
The Bill of Complaint of James M. Wheeler
and Moses S. Ball, Citizens and residents
of Lee County Virginia, and Merchants
and partners in trade, under the firm
name and style of "Wheeler & Ball"
humbly Complaining respectfully represents
to your Honor that on the 17th day
of June 1875 in Lee County Virginia,
one Charles Peyton and one William
M. Swap then of Claiborne County Ten-
nessee executed and delivered to your
Orators their joint and several note
for the payment to your Orators
the Sum of \$3316.17 for Value received
of them, which note was executed and
dated on the 17th day of June 1875
and was due and payable one day
after the date thereof, which note is
in the words and figures following
to wit:

"\$3316.79. One day after date we or
either of us bind ourselves our heirs and
assignes to pay Wheeler & Ball the Sum of
Thirty Three Hundred and Sixteen Dollars
and Seventy nine Cents for Value received of
them. June 17th 1875. Charles Peyton & Seal
Jst. Frank Peyton. W. H. Swap & Seal

Your Orators aver that although the said note has long since become due and payable to your Orators, yet the said Charles Peyton and William W. Swaff have never paid the same nor any part thereof, nor has either of them ever paid the same or any part thereof, to your orators, or to any one for them, although often requested so to do, but they and each of them have hitherto, failed and refused so to do, and still do fail and refuse so to do. Your Orators further allege that the said Charles Peyton and William W. Swaff are nonresidents of the State of Virginia, but they have real and personal estates, in Lee County Virginia, which are liable to be subjected to your Orators' debt, and to show what estates the said Charles Peyton and William W. Swaff own in Lee County Virginia that may be subjected to said debt, Your Orators will here state the nature and extent thereof as far as their knowledge extends. On the 10th day of September 1872 the said Charles Peyton leased by a written Contract and lease from John G. Newlee, Edwin DeMortimer, Paul C. Bedford and Presley A. Howard an Iron Works property &c. ^{and a copy of which is herewith filed} which Contract & lease ~~is in the words & figures following~~

Your Honor will perceive from Said written Contract and lease that the Said Charles Peyton became entitled to the Said Iron works property and other property and privileges mentioned in Said lease and written Contract for the term of five years from the 10th day of September 1872. And your Orators aver that the Said iron works property and other property and privileges mentioned in Said Contract and therein leased and rented to Said Charles Peyton lie in Lee County ^{and Claiborne County Tennessee} Virginia, at and near Cumberland Gap and within Jurisdiction of your Honorable Court. Your Orators further allege that after the Said Contract and lease was made and entered into, the Said Charles Peyton and William H. Swap entered into a partnership, under the firm name and style of Peyton & Swap, for the purpose and business of manufacturing Pig Iron and Castings; and immediately commenced performing and carrying out generally the Said Contract and lease, as the Said Charles Peyton had bound himself to do, and thus far they have performed and carried out the Said Charles Peyton's part of Said Contract and lease faithfully according to its letter and terms.

Your Orators further allege that under the said Contract and lease the said Charles Peyton was to be paid by the said lessors for all permanent improvements made by the said Charles Peyton to the machinery, and for all buildings which might be erected on the leased premises and which were of a permanent character. And your orators further allege that the said Charles Peyton and the firm of Peyton & Swaff have made the following permanent improvements to the machinery. They have erected and made improvements to a blast furnace and foundry on the premises, they have furnished a water blast blower and erected water works to run the same on the premises, and put the same in running order, they have moved a mill on the premises at the request of the lessors, and they have made other permanent improvements ^{to the machinery and} on said leased premises amounting in the aggregate to the sum of \$3000.00

Your Orators further allege that the said Charles Peyton, and the firm of Peyton and Swaff, have also in pursuance of said Contract, erected on the leased premises on the Tennessee side thereof one dwelling house in which the said Charles Peyton

resided and also a dwelling house in which the Said William W. Swap resided and also the buildings at the furnace and foundry on the Virginia Side and also other buildings of a permanent character ^{on the leased premises} all of which are worth in the aggregate the Sum of \$3000.00.

Your Orators allege that by virtue of Said Contract of lease the Said lessors and their personal representatives are indebted to the Said Charles Peyton and the firm of Peyton and Swap as the Case may be in the Said Sum of \$6000.00 for the Said improvements and buildings made and erected by them upon the leased premises and for other works done and performed by them for and at the request of Said lessors. But your orators will here state that the Said Charles Peyton and William W. Swap claim that the water blast blower and fixtures thereto are not a part of the freehold but are still their property. Your Orators further allege that the Said Charles Peyton and William W. Swap and the firm of Peyton and Swap own and are possessed of other personal estate in Lee County Virginia which may be subjected to your Orators debt to wit:

one large Set of weighing Scales, one lot of Cord wood, a lot of Coal and iron ore, and iron and Castings, and other personal estate.

Your Orators will here State that after the Said Contract and lease was made and entered into between the Said Charles Payton and the Said Lessors, the Said John G. Newlee one of the Lessors departed this life intestate and he left at his death the following Children to whom his real and personal estate, ^{after paying his debts and liabilities} descended to wit: William Newlee and Adaline Newlee who married one John M. Divine and Eugenia Newlee who married one Jacob Slaughter and the Said William Newlee became his administrator in Tennessee and one Thomas S. Ely Sheriff of Lee County became his administrator under an order of Court in Lee County Virginia. Your Orators will further State that the Said Lessors executed a mortgage to one Alexander L. Greer upon the Said iron works property including the leased premises; and that one William G. Brown sued out an attachment in equity out of the Circuit Court Clerks office of Lee County and had the same levied upon the leased premises and other property.

Your Orators allege that by the terms of said Contract of lease the said lessors were to pay for said improvements ^{made} in machinery and buildings &c. at the expiration of said lease the amount to be ascertained as therein prescribed, but the said Charles Payton had the right to terminate the lease at any time if he ascertained after using and testing said iron works that it will not pay expenses or pay sufficiently to justify him in continuing to run the same for the term of five years, and your Orators aver that the said iron works having been used and tested sufficiently, will not pay expenses nor pay sufficiently to justify the said Charles Payton in continuing to run the same for the said term of five years, and he has the right under said Contract to terminate his lease pursuant to the same. Your Orators will further state that on the 19th day of July 1875 the day on which this suit was brought they filed their affidavit in the Circuit Court Clerk's office of Lee County for attachments in law and equity to be issued thereon which affidavit is marked (A) and prayed to be considered as part of this bill and upon this affidavit your Orators sued out attachments in law and equity.

which have been executed and returned to the Clerk's office in this cause as will fully appear. Your Orators allege that the said William Newlee as admr. and heir of John G. Newlee decd. and John M. Divine and Adaline his wife and Jacob Slaughter and Eugenia Slaughter his wife and Charles Peyton and William M. Swap and Presley H. Howard Paul C. Bedford and Alexander L. Greer are all nonresidents of Virginia but they own the leased premises at and near Cumberland gap in Lee County Virginia and Claiborne County Tennessee and being nonresidents their estates as well as the estate of Edwin Demostimer can be subjected to the payment of the said note due your orators by attachments at law and equity and by this bill in Chancery.

Now the object of this bill is to recover and collect of the said Charles Peyton and William M. Swap the amount of said note and interest thereon to wit the sum of \$3316.79 with legal interest thereon from the 18th day of June 1875 till paid, and to subject their real and personal ^{including their lease} estates to the payment thereof by attachments at law and in equity, and to effect which to especially attach the debts and liabilities due and to

become due by and from the Said lessors and their administrators and heirs or either of them to the Said Charles Peyton and Wm. M. Swap or either of them or to the firm of Peyton & Swap, and if necessary to Subject the real and personal estates of Said lessors and their admors. & heirs to the payment of Said debts and liabilities all of which have been attached and levied on for that purpose by attachments issued in this Cause.

Your Orators being without an adequate remedy at law and releivable only in a Court of Equity, their prayer therefore is that the Said Charles Peyton and William M. Swap, and the Said Charles Peyton and William M. Swap partners in the trade and business of making iron and Castings under the firm name and style of Peyton and Swap, and Presley A. Howard, Edwin Demortimer, Paul C. Bedford William G. Newlee Administrator of the estate of John G. Newlee deceased in the State of Tennessee, and Thomas S. Ely Sheriff of Lee County and as such administrator of the estate of John G. Newlee deceased in Lee County Virginia and Said William G. Newlee John M. Divine and Adaline Divine his wife Jacob Slaughter and Eugenia Slaughter his wife heirs of John G. Newlee decd.

and William G. Brown and Alexander L. Green be all made the parties Defendants to this bill and that they all be summoned and required to answer the several allegations of the same upon their oaths and that an order of publication be duly made posted and published against the said nonresident defendants and that attachments at law and in equity be issued and executed against all said defendants and their real and personal estates to the amount of your Orators Claim and that upon a hearing in this Cause that your Honor will enter a Decree against the said Charles Payton and William W. Swap for the amount of said note and interest thereon and that their real and personal estates be subjected to the payment of the same, and especially to subject whatever may be due now or hereafter from the other defendants or any of them to the said Payton and Swap or either of them or to the firm of Payton & Swap and if necessary to subject their real and personal estates to the payment thereof, And such other further and general relief be extended to your Orators as may be consistent with equity and justice and best suited to their Cause may the Commonwealths

writ of Spa. and the attachments prayed
for and all other necessary process issue
directed &c.

David Miller

For Compls.

Amendment to Bill

To the Honorable John A. Kelly Judge of the
Circuit Court of Lee County;

The amendment to the above Bill of Complaint
respectfully represents to your honor that since
this suit was brought and after the attachments
issued in this cause were levied the said De-
fendant Charles Peyton departed this life
intestate and at the term of the County
Court of Lee County in the year 1875 one William
A. Orr was appointed and qualified as his
administrator and it will be necessary to
make him a party to this suit as the personal
representative of the Defendant Charles Peyton
deceased and your Orators Wheeler and Balls
additional prayer is that the said William A.
Orr admr. of Charles Peyton deceased be also
made one of the parties to this suit and that
they said William W. Swope surviving partner of the late firm of Peyton & Swope
they be summoned and required to answer the
allegations of said Bill and this amendment
thereto on oath in all matters in which an
answer was required of his decedent ^{& said firm} and in
all other matters known to them relative to this
cause and that they be required to state

(1)

CC

This contract and lease made and entered into on
this the 10th day of September 1872, by and between
John G Sewler and E Demottiman of Cumberland Gap
Tennessee and Paul C Bedford and Reuben A Howard
of Montgomery County Ky. parties of the 1st part and
Charles Peyton of Fitzburg Bstel County Ky. party of
the 2nd part, Witnesseth that the parties of the 1st
part have this day leased to Charles Peyton party
of the 2nd part for the term of five years from
this date their Iron works property located at Cum-
berland Gap Tennessee, and known as the Sewler
Iron works, the said iron works property consists of
a blast furnace, foundry, flouring mill and stone
house and block of land supposed to be fifteen acres
more or less, all situated within the city limits of
Cumberland Gap Tenn, also the water power, so as not
to interfere with the Cording machine and saw mill on
said premises, or so much thereof as may be necessary
to run said furnace and mill during the term of said
lease, and the parties of the first part do hereby lease
for the term aforesaid to the said party of the 2nd part
the coaling and iron ore privileges and furnace and
foundry on the eight hundred acres of land owned by
the said parties of the first part, and situated at Cum-
berland Gap and being the same tract that the city of
Cumberland Gap is now located upon, and the land inside
said city of Cumberland Gap except the 15 acres aforesaid
is hereby excepted out of said 800 acres. The party of the
2nd part is hereby give the privilege of using any and all

Timbers on said land, but the parties of the 1st part hereby reserve the right to get sufficient fuel for four families off of said 800 acres. In consideration of the above lease the party of the 2nd part agrees to complete the buildings necessary to carry on the business of manufacturing pig-iron and castings at his own expense, and also agrees that he will proceed immediately to repair said iron works, and that he will as soon as he can make said repairs proceed to the manufacture of iron, and that he will after paying all the actual expense of manufacturing pig iron and castings and in addition thereto the sum of thirty six hundred dollars per year, the salary of Charles Peyton and two others that he will account for and pay over to the parties of the first part, an equal half of the net proceeds of the pig iron and castings made at said furnace and iron works during the period of this lease to be divided by the parties of the first part according to their respective interests, The parties of the first part hereby agree that the party of the second part may have the use of any other lands they may own in common for the purpose of rolling wood iron or any other thing to and from the iron works and the markets and may also have the use of all other land that they may own until the same may be sold by the parties of the 1st part into town lots. and whenever they sell a lot they are to have ~~the~~ possession of the lot so sold. The parties of the first part hereby agree that the party of the 2nd part

(3)

shall be paid for all permanent improvements made to the machinery and for all buildings which may be erected which may be of a permanent ~~Character~~ upon said premises, and he shall be paid the full value of said improvements at the Term of the expiration of ~~this~~ lease, and in order to ascertain the value of said improvements each of the two parties to this lease shall select a man for that purpose, and if the two men thus selected cannot agree then said two men shall select some third man, and the award of said two arbitrators or said two arbitrators and umpire shall be final and binding to all parties to this lease. ~~Of~~ The parties of the second part after using and testing said iron works shall ascertain that it will not pay expenses, or pay sufficiently to justify him in continuing to run the same for the five years, he may terminate this lease by giving to the parties of the first-part sixty days written notice of his intention to cease operation and by surrendering the possession of the premises to the parties of the first-part. But if said lease shall be so terminated the parties of the first-part are to pay ~~for~~ the permanent improvements named above, ~~Of~~ the party of the second part shall at the end of this lease have any materials for manufacturing iron on hand, then the parties of the first-part are to have the same at its then value, to be ascertained in the same manner as the improvements aforesaid or said party of the second part may have the use of the

use of the

(4)

iron works upon the same terms as those named above for a term sufficient to use up all said materials, The books of the party of the 2nd part shall ~~be kept~~ during all business hours be kept open and other convenient times open to the inspection of the parties of the first-part, and The party of the 2nd part hereby agrees to keep regular books of account showing all the expenses of ~~the~~ manufacturing iron and agrees that at the end of each blast he will make out a true statement of all expenses and deliver the same to the parties of the first-part, and that he will then pay over to the parties of the first-part after deducting the actual expenses of manufacturing the iron and \$300 ^{or} per month beside (or \$3600 ^{or} per year) one equal half of the net profits as rent for said premises, It is expressly understood and agreed that this is a lease and does not make the parties hereto partners, and that the parties of the first part nor the property hereby leased are not to be responsible or liable in any way for any of the debts of the party of the second part in running said iron works or otherwise, The party of the second part hereby binds himself to return the premises hereby leased to the parties of the first part at the expiration of this lease.

Signed in duplicate this day and year aforesaid

Copied from the Registers office of Claiborne
County Tennessee by H. S. Sloan

Jagwell

Tenn.

Delivered to J. M. Wheeler June the

25, 1875,

H. S. Sloan

J. A. Howard

Edwin Semontimore

J. C. Bedford

John L. Newlee

Charles Peyton

To the Honorable John A. Kelly Judge
of the Circuit Court of Lee County:

The Separate answer of William H. Orr
Administrator of the estate of Charles Payton
deceased to the ^{and appended bill} bill filed by Wheeler
and Ball against his decedent and others
and for answer thereto this respondent says
that he waives all process against him
and Consents that said bill be revived
against him and he being only ad-
ministrator of Charles Payton deceased
he knows nothing of his own knowledge
of the note on which this Suit is brought
and therefore requires proof of it but
he is informed and believes that under
the lease Contract in the bill mentioned
^{and otherwise} the Defendants Demostimer & Howard &
Bedford and the said Thomas S. Ely ad-
ministrator of John G. Newlee deceased
are indebted to this respondent and
the late firm of Payton & Swap ⁱⁿ and
a Considerable Sum which indebtedness
can only be ascertained by an account
and a Settlement of the matters be-
tween the parties and if your Honor
finds that this respondent and the
Surviving obligor William M. Swap are
indebted to plaintiff then he asks that

Your Honor will permit him to proceed
and ^{compel} ~~enforce~~ his Codefendants to a
Settlement and payment of whatever
may be due and owing to him from
the Codefendants. And having an-
swered he prays to be dismissed with
his Costs. Wm. A. Orr admr. of the
estate of Chas. Peyton decd.

9
Wheeler & Ball
at 13
Answer
Peyton & Sons

(14)

Wheeler & Ball

vs. } Decree

Payton & Swaff
& others

Entl page 687.

Jas W. Carr. clk.

Entl

L. J. K.

Sept 7/11

Entered
for \$58
just on ok

(12)

Wheeler & Ball plaintiffs vs. Peyton et al. et al. Defs. In Chy.

~~Transcript of the proceedings in the case of~~

Upon the Calling of this cause, on this day, the defendants
(William B. Newlee, admr. of the estate of John G. Newlee dead
in the State of Tennessee, William B. Newlee, John W. Davis
and ^{his} wife, Jacob Sluypers and Eugene his wife,
moved the Court for leave to file their Demurrer to ~~the~~
bill and amended bill, which leave was granted them; and
thereupon they filed their said demurrer, which was instantly
set down for argument. And the same was argued by Counsel
for the plaintiffs and the said defendants. On consideration
whereof, the Court is of opinion that ~~if~~ the defendant Demurrer
is a resident of Virginia, and, by reason of his joint contract with
the obligation, under the lease to his co-defendant Peyton, executed
by himself, P. A. Howard, R. C. Bedford & John G. Newlee, is indebted,
either to the said Peyton, or to Peyton & Swat, then the plaintiffs are
entitled to proceed against said Demurrer, by way of foreign
attachment, and to compel ~~him~~ him to answer as to his said
joint indebtedness: and since the said J. G. Newlee's estate, and
the said co-defendants, P. A. Howard, & R. C. Bedford, are directly
interested, and the said Demurrer is entitled to have their aid in
his defence, it is proper that the personal representatives of said
J. G. Newlee, in Virginia, and said P. A. Howard & R. C. Bedford
should be made parties defendant, the said Howard & Bedford may
be non residents. But since the personal representative ^{said J. G. Newlee} in Tennessee,
is not subject to the jurisdiction of this Court, and the subject of his
administration of the foreign effects of his estate, cannot be controlled
in any manner here, the Court is of opinion that he is improperly
made a party defendant ~~in this case~~. And the Court being
of opinion that the covenant to pay for permanent improve-
ments, put upon the premises leased, was a personal covenant, and

did not bind the heirs; and since they are ~~only~~ ~~entitled~~ ^{recused} only, entitled as such to the rents, which must be paid to them by any tenant who may come in, under any decree rendered by this Court, operating so as to assign the ~~estate~~ ^{lease} of the lot tenant Peyton, ^{and have no interest in the estate acquired by said tenant} it appears to the Court, that the heirs of said J. S. Newlee are not properly made parties to this suit. It is therefore adjudged that the Demurrer of the defendants be sustained, and the bill dismissed as to them. ~~And~~ the plaintiff may have a sale upon the said defendants' ~~Demurrer to the bill~~ ^{and the plaintiff} shall pay to them their costs. And the bill is taken for confessed as to the ~~other~~ defendants, Demosthenes, Howard Bedford, Edg. administrator of ~~J. S. Newlee~~ ^{J. S. Newlee} and it is appearing that ~~process has been executed, and upon the amended bill, the~~ ^{process has been executed, and upon the amended bill, the} ~~admission of same is~~ ^{admission of same is} ~~admitted to be true~~ ^{admitted to be true}. And W. A. Orr administrator of Chas. Peyton decd. now appearing and filing his answer, to the original and amended bills, and consenting to the hearing of the Cause the same now came on to be heard on the original and amended bill, the exhibits filed therewith, the answer of the said defendant W. A. Orr ~~adms~~ ^{adms} ~~to~~ ^{with} the plaintiff's replication thereto ~~was~~ ^{is} argued by counsel. And it appearing that process has been duly executed on the defendants, Edwin Demosthenes, Thomas S. Edg. as admr. of J. S. Newlee and W. G. Brown, and that Publication has been duly made against the defendants, W. W. Swap, Peely A. Howard, Paul C. Bedford and Alexander Green, the bill as to them is taken for confessed. On consideration whereof it is adjudged, ordered and decreed that it be referred to H. B. Morgan one of the Commissioners of this Court to enquire whether the iron works levied on under plaintiff's attachment lay wholly or partially in this County & if partially then to what extent: and that said Commissioner do take an account between the representatives of Peyton ^{& W. W. Swap} & the defendants Demosthenes Howard, Bedford, and the representatives of J. S. Newlee decd. ascertaining whether or not there be any thing due ~~from them~~ ^{to the said decedent} to the said decedent Peyton, or to Peyton or Swap, growing out of ~~said~~ ^{the} lease of said iron works, and he will report to Court: reporting any other matter deemed pertinent by himself, or required by either party. & the cause is continued.

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Virginia Lee County to wit:

We the undersigned James M. Wheeler and Moses S. Ball Merchants and partners in trade in the business of merchandize ^{and residing} at ^{and near} Walnut Hill in Lee County ^{Virginia} under the firm name and style of Wheeler & Ball and ^{who are} Complainants in a Suit in Equity brought and to be ~~prosecuted~~ ^{prosecuted} in the Circuit Court of Lee County Virginia for ~~themselves~~ ^{ourselves} against Charles Peyton William W. Swap as individuals and as members of the firms of Peyton & Swap which firm is composed of the said Charles Peyton and William W. Swap and are or have been partners in the trade and business of making iron and Castings near and at Cumberland Gap in Lee County Virginia ^{& Claiborne County Tennessee} and which suit is also brought and to be ~~prosecuted~~ ^{prosecuted} also against ~~Robert~~ ^{Ben} Howard, Edwin Demortimer, Paul Bedford and John G. Newlee's administrators and heirs ^{and Thomas S. Ball Sheriff of Lee County and} Alexander S. Greer, and ^{and} William G. Brown all of whom are made defendants in said suit, the object of said suit is to collect of Defendants Charles Peyton and William W. Swap a ^{joint and several} note executed to us Wheeler & Ball for the sum of \$3316.79 by said Charles Peyton & William W. Swap executed and dated on the 17th day of June 1873 ^{and due one day after date} and to subject their real

Such proceedings in this case as may be required by the Court of Virginia &c.

estates to the Payment of the Same the Said Charles Peyton being the owner of an unexpired lease of iron works at Climborsland²⁴ in Lee County and to Subject also ~~their~~ personal estates to the payment of the Same and to Subject any debts or liabilities due or to become due and owing from the Said P. A. Howard, Edwin Demortimer, J. C. Bedford and Said administrators and heirs of John G. Newlee deceased or any of them or any other persons to the Said firm of Peyton and Swap or either member of Said firm as individuals to the payment of the Same and to Subject their real and personal estates to the extent of their liabilities and debts ^{now due or to become due} to the Said Peyton ~~and~~ and Swap or to them or either of them as individuals which real and personal estates ^{debts and liabilities of all these defendants} are to be attached and levied on and Subjected in this Suit by an attachment ^{and other attachments authorized by law} in equity and for the purpose of having Said attachment ^{and other attachments authorized by law} in equity issued and levied we James M. Wheeler and Moses S. Ball members of the firm of Wheeler & Ball as ^{and plaintiffs in said suit in equity} aforesaid do Solemnly Swear that the Said debt ^{and note} due from the Said Charles Peyton and William W. Swap to us Wheeler & Ball amounts to the sum of \$3316.79 and was executed and dated on the 10th day of June 1875 and that the Said note became due on the 18th day of June 1875 one day after the date thereof and we further do Solemnly Swear that Said note ^{claim} and sum of \$3316.79

with interest thereon since the 18th day of June 1875 is justly due and owing from the Said Charles Peyton and William W. Swap to us Wheeler & Ball no part thereof having ever been paid by them or either of them or any one else for them to us or either of us and we do further Solemnly Swear that there is and we have present Cause of action and Suit therefor and that the Defendants Charles Peyton and William W. Swap and the defendants Charles Peyton and William W. Swap partners in the business of making iron and Castings under the firm name and style of Peyton & Swap and the Defendants Presley A. Howard and Paul C. Bedford and William G. Newlee administrators of John G. Newlee deceased and William G. Newlee Dr. John W. Divine and Adaline Divine his wife and Jacob Slaughter and Eugenia Slaughter his wife heirs of John G. Newlee deceased and Alexander L. Greer are all not residents of this State, and we do further Solemnly Swear that we believe that the Said nonresident ^{defendants Charles Peyton & William W. Swap and the firm of Peyton & Swap and the other} defendants have estates and debts due them within Lee County Virginia in which this Suit in equity is, and we further do Solemnly Swear that the Said nonresident defendants are Sued in this Suit in equity

with Thomas S. Ely Sheriff of Lee County and as such administrator of the estate of John G. Bowles deceased in Lee County Virginia and with William G. Brown both defendants residing in Lee County Virginia and upon this affidavit we Wheeler and Ball ask the Clerk of the Circuit Court of Lee County Virginia to forthwith issue an attachment in equity and such other attachments as are authorized by law against the estates of the Said nonresident defendants for the amount of our claim.

and we do further Solemnly Swear that our Said Claim of \$3316.79 and interest thereon as aforesaid is just and unpaid and that we believe that we are entitled to and ought to recover ^{at the last} the Said Sum of \$3316.79 and interest thereon from the 18th day of June 1875 till paid and the Costs of this Suit and we further make affidavit and do further Solemnly Swear that we further believe that the ^{Defendants the} Said firm of Peyton & Swap and that the ^{Defendants the} Said Charles Peyton and William W. Swap intend to remove their own estates and the proceeds of the Sale of their property and a material part of such estates and proceeds out of this State so that process of execution on a judgment and decree in Said Suit in equity when it is obtained will be unavailing and we hereby require the Clerk of the Circuit Court of Lee County to issue an attachment in equity ^{and such other attachments as are authorized by law} for the amount of Said Claim and interest.

And we the Said Wheeler and Ball and as members of Said firm do further solemnly swear that ^{our} ~~their~~ Said Claim of \$3316.79 against the Defendants Charles Payton and William W. Swap and interest thereon is just and amounts to Said Sum of \$3316.79 with interest thereon as aforesaid and that the same became payable on the 18th day of June 1875 and no part of which has ever yet been paid and that we further believe the Said Charles Payton and William W. Swap ~~their~~ ^{our} Said Debtors and defendants intend to remove and have removed their effects out of this State so that there will probably not be therein sufficient effects of the Said debtors and defendants to satisfy our Claim when judgment and decree is obtained therefor ^{should} ~~action~~ only the ordinary process of law be used to obtain such judgment and decree. And we the plaintiffs upon these affidavits require the Clerk of the Circuit Court of Lee County Virginia to endorse on the Summons in Chancery issued in this Cause an order to the officer to whom it is directed to attach the real and personal estates of the Defendants that are nonresidents mentioned in this affidavit.

and also the Said debts and liabilities due and to become due from the Defendants ^{Prisley A. Howard Edwin Demortimer Paul C. Bedford and William G. Newlee and Dr. John W. Divine and Adaline Divine his wife and Jacob Slaughter and Eugenia Slaughter his ^{wife} heirs of John G. Newlee decd and William G. Newlee administrator of ^{and Thomas S. Ely Sheriff of Lee County and as such administrator of the estate of} John G. Newlee deceased, to Charles Payton and William W. Swap or either of them or to the Said firm of Payton & Swap, and also any other estates of Defendants whether in their own hands or the hands of other defendants, and we further Solemnly Swear that we are informed and believe that the Said Howard, Demortimer and Bedford and John G. Newlee's administrators estate and heirs are and will be indebted to the amount of Several thousands of Dollars to the Said Charles Payton and William W. Swap ~~xxx~~ the firm of Payton and Swap under and by virtue of a Contract of ~~work~~ ^{into} heretofore entered ^{into} between them for the iron works property ^{& near} H.C. at Cumberland Gap in Lee County ^{& Claiborne County Tennessee} Virginia ~~xxxx~~ improvements done and to be done and for other things under Said Contract all of which will appear by Said Contract which was entered into ^{and dated} on the 10th day of}

September 1872. Given under our Hands on this the 19th day of July 1875.

J. M. Wheeler
M. S. Ball

Virginia Lee County to wit:

This day James M. Wheeler and Moses S. Ball whose names are signed to the above affidavit bearing this date, personally appeared before me the undersigned a Justice of the Peace in and for Lee County Virginia and made oath and affidavit in due form of law that the facts and statements made and set forth in the above and foregoing affidavit are true to the best of their knowledge information and belief. Given under my hand and Seal. This the 19th day of July 1875.

A. C. Willis J. P. Seal

(2)-1
Wheeler & Ball

vs. affidavit.

Pyton & Swap
& others

Filed Aug 19th 1875,
James W Orr. clerk.

(A)

Virginia, Lee County, to wit.

This day David Miller personally appeared before me and made oath that to Charles Peyton, Wm W Snaap, Presley A Howard, Paul L Bedford, Wm H Newlee Admr of John C Newlee decd in Tennessee, and the said Wm H Newlee, John W Divine & Adaline Divine his wife, Jacob Slaughter & Eugenia Slaughter his wife and Alexander L Greer are nonresidents of the State of Virginia. Given under my hand this 26th day of September 1875.

James W Orr, clerk.

(4)
Wheeler + Ball

vs } Affidavit

Peyton + Snaph et als.

Filed Sept 28th 1875.
James W Orr. clk.

Cumberland Gap May the 25th 1877.
Wheeler & Ball Peff

vs.

Payton & Swaff to the Defts } In Chancery

The deposition of S. G. Shumate & others taken in this cause on the 25th of May 1877. at the Store house near the residence of Mr. H. Butler to be read as evidence upon the taking of an account in this cause, as well as upon the final hearing thereof in the circuit court of Lee County.

The Said Samuel G. Shumate a dectup for the Peffs being duly sworn deposes and says

I was employed by Messrs Payton & Swaff to aid in repairing what is known as the "furnace stack" the repairs made thereon were about these, the top of said "stack" was thrown down the distance of some 7 or 8 feet, and again re-built of stone, the inner wall of said furnace consisting of sand stone, was taken out, and re-built anew and the brick on the top of said furnace stack was taken off, and again re-built, and I cannot now state precisely what the repairs on said furnace stack was worth, but my opinion now is that it must have cost Payton & Swaff not much less than \$1200.00 at the prices they were then paying for workmen, and teams hands &c. Said Furnace Stack, I regard as a valuable permanent improvement upon the leased premises, And I think the repairs made

On said "Furnace Stack" at the ^{time} Peyton & Swaff turned
the same over to the personal representative of
John L. Newlee were really worth about \$1200.00

Ex Crofs examined by Deft. W. H. Newlee.

The ~~means~~ employed by Peyton & Swaff to do
the masonry work on said furnace were ~~very~~
good work men, but I do not know whether
they were regular masons or not, they did
their work quite well. I was engaged on
said
inn wall, and repairing said stack about
10 weeks as well as I now remember.

Before the lease was made between the parties
Newlee & Heller had at one time made iron
at said furnace, and they or some one else
had built said "Furnace Stack" inn wall,
&c, and the furnace stack inn wall & did
as good work for them, as the same did
for Peyton & Swaff after said repairs were made.

I do not know what condition the Inn wall
used by Newlee & Heller was in, at the time
Peyton & Swaff got the possession thereof, but
if it was as good as when I knew it in 1858
or 1859, it was worth about as much as the
one repaired by the latter.

There was a mill near where said Furnace
Stack is now situated, and it was so near
the same, that there would have been great
danger of its being set on fire by said furnace
but said Mill was torn down by some one

but who did it, or under what circumstances it was taken down I cannot say.

And further this circuit with note

S. B. Sherrate

Wm. & R. Newberry another circuit for the Pefferding
Survey, says

Payton & Swaff Put up upon the leased premises a pair of Iron or Cast blowers used for making the wind or blast for said furnace, and commonly called the blowing cylinders. These cylinders were hauled from the Old Red river forge in Estill County Kentucky, and my recollection now is, said blowing cylinders and fixtures weighed not less than some 9000 lbs. And while I am not a very good judge of the value of such an article, yet my best judgment is, that at the time Payton & Swaff left them said blowing apparatus and fixtures were reasonably worth about \$1200.00. but I cannot say that this estimate is at all correct.

I hauled a good many of the boards used in covering the sheds, & other buildings. Messrs Payton & Swaff, erected the sheds around the main coal house, built what is known as the bridge loft, built the frame work around and over the water wheel, that turns and works the blowing machine and built or constructed said water wheel and they also built or erected what is called the Small Cupola, and a small shed attached to what is called the Pot House, the mauling

flasks &c. were also made by Peyton & Swaff
but I cannot say what these repairs were ac-
companied with at the time Peyton & Swaff left, or
surrendered them to Mr Newlee. but my
best estimate of their value at that time is ^{that} ~~that~~
they were worth somewhere between \$500.00
and \$1000.00, And further this witness saith
that, V. W. C. Newberry

Thomas Mosier another witness for the Deffs
being duly sworn deposes and says.

The "Furnace and Stack" had been idle
some 10 or 12 years, from the time Newlee
& Heller used it, until Peyton & Swaff got
possession of it under the lease, and I do not
know in what condition it was in, at the
time Peyton & Swaff first came to its possession
but soon after they got it, I learned that
they took out the inner wall left by Newlee
& Heller, and put in a new one in its place
which done no good, And then this second
inner wall was again taken out of the
Stack, and the present inner wall was
put in the Stack by Peyton & Swaff, The
present inner wall is a good one, and
in its construction, and the repairs on the
Stack, in taking down and putting back the
outside Stone work, and re-building the brick
work on the top of the Stone work I suppose
must have cost Peyton and Swaff at least \$1000.00.

must have cost Peyton and Swaff at least \$1000.00

5.

And I am of opinion that these repairs as left by Peyton & Swaff did add materially to the actual value of Mr Newlee's property. But I cannot say how much it did so add, in the way of permanent improvements.

The mill erected by Mr Newlee stood north of where the furnace & stack now stands, and if the mill had remained where it was, it would have been in great danger of being burned down while making iron. But it has been removed, but by whom, or under what circumstances it was removed I cannot say. The blowing apparatus, the frame work supporting it, the water wheel which works it & all things connected therewith, I think at the time Peyton & Swaff left it, was reasonably worth about \$1000.00, and that it added that sum to Mr Newlee's property in the way of permanent improvements. The Flasks made by Peyton & Swaff for moulding Hallows ware, the building of the cupola in the condition these were in, when Peyton & Swaff left there, I think were worth about \$75.00. The little shed at the foundry I think was worth but little, for it leaked from the beginning. The sheds around the main coal house I cannot price, but the bridge house as it is called, is well put up & out of good material but as to its value I cannot state, it was put up by Peyton & Swaff.

On a close examination by Deft Newlee, the witness says

I was foundryman for Peyton & Swaff from Aug. 1873 to the time they left, ^{and I worked for them} ~~which was in about~~ about 2 years, and during that time I found no difficulty in making Iron. I remember of hearing Peyton & Swaff say, that they had made some four five or 6 unsuccessful attempts to make Iron, and had in the main failed to make Iron. And my opinion is, that their failure was in the main owing to their want of a knowledge as to how to manage the Ore, and the want of a skilled foundryman.

The Inn wall as it is called now in the Stack was built under and by my direction, and I aided in its construction, and during its construction, there was some 5, 6, or 7 hands generally at work at it, and that force of hands was engaged a considerable length of time in its construction but the number days thus employed by them I cannot now state.

In its construction there was employed two Stone masons, - one by the name of Crawford & the Kerby, the latter received one dollar per day for his services and I do not know what Peyton & Swaff paid Mr Crawford per day.

Beside the hands above mentioned who worked at the furnace, there were others employed in getting out the Stone, and others with Teams hauling them to the furnace, Some of the old Stone taken out of the Inn wall, were again used in re-

building the present Inn wall, but there was
not a large quantity of them thus used.

The said Inn wall is about 28 feet high, and on
the inside at the largest point is about $9\frac{1}{2}$ feet
in diameter at the base, and tapers gradually
to the top, where it is about $2\frac{1}{2}$ feet in diameter.

He examined in brief.

The Mill house put up by Mr. Keizer was so situated
that the present bridge house could not have
been erected on its present site without removing
a part of the Mill house, but it could have
been erected somewhat differently without the
removal of the Mill house, if it had been
so erected it would not have been as convenient
as it now is, and then if it had not been re-
moved, the Mill house would have been in danger
of being burned on account of its being so near
the furnace. When the Mill house was
taken down, still one pair of stones with the
Husk frame was left standing and in such a
condition as to be used, and Messrs. Peyton & Swaff
did run one pair of stones the greater part of the
time they were here, whenever they had grinding
to do and the water was sufficiently high to
run the furnace & Mill at the same time, some-
times the Mill would stand idle for two months
at a time & while thus idle the water wheel
would dry out, and be thus damaged.

And further this witness saith not.
Thomas ^{his} Mosier,
mark

B. F. Bully another witness for the Peffs being sworn says

The furnace stack and Mill house were so situated with reference to each other, that, in my opinion, it was necessary to move one or the other of them, on account of the danger of fire, and my opinion is that it would have cost less to move the mill than the furnace stack, at any rate I would rather undertake to move the mill than the furnace.

Our crop examination witness says.

I saw two houses that were built up by ~~the~~ ^{Dr.} ~~Demortimer~~ ^{Demortimer} on the land ~~which~~ ^{purchased} from Rose, one of which was a small house the other was about 36 feet long by about 18 or 20 feet wide, both of which were what is called box houses, and were built up on what I would call a rather cheap scale.

I was tolerably well acquainted with the mill built up by Mr. Twiss, and which was said to have been taken down by Messrs. Peyton & Swartz or one of them, or by their direction, I regarded the mill as a tolerable good mill, ~~there were~~ ^{two pairs of runners} Among other fixtures, connected with said mill, there was a screen, small mill, Belling chest, cloth &c. But what said mill was worth or what it would be worth to re-build it I cannot say, being a poor judge of such matters.

The mill was used sometime after the mill house was taken down, for the purpose of grinding and was thus used, whenever there was water sufficient to run it, and the furnace at the same

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Time, and I think it was thus used, until the
~~after which~~ gave away about the time Peyton &
 Swaps left here. And further this witness says not.

B. F. ^{his} Gully
 mark

James F. Drullan another witness for the Deff
 being sworn says.

I was employed by Messrs Peyton & Swaps as a
 Carpenter to work on the Bridge House, the frame
 which supports and surrounds the water wheel
 that runs the blowing apparatus, the shed attached
 to the main coal house, and the shed attached
 to the Pat House. And my opinion is that the
 Sheds attached to the Coal house and Pat House were
 of but little if any value as permanent improve-
 ments. I regarded them at the time as mere
 temporary structures. As to the Bridge House,
 and the frame work around and supporting the
 water wheel which works the blowing apparatus,
 and the said water wheel and the covering over
 the same. I am of opinion that at the time
 Peyton & Swaps left here, these two structures
 were reasonably worth as permanent improve-
 ments about the sum of \$500.00 exclusive of
 said Blowing apparatus, and this estimate is
 made as to the value thereof as the property stood
 when Peyton & Swaps left here, regardless of how
 they may have got a part of the timbers used
 in the construction of these buildings.

A part of the material used in these two structures
 were ~~then~~ obtained by tearing down the Mill

leased by Newlee & others to Mr Peyton, and the
timbers and material there used I should think
was reasonably worth about \$25.00

The said Peyton & Swap erected or caused to be
erected three houses on the 800 acre tract lying
in Tennessee & within the city limits of Cumberland
Land Gap, each of which are one story buildings.
One and the principal of said buildings is a sort
of box house with front & ell, with two chimneys
and is the same house in which Mr Peyton lived.
This house I think was reasonably worth at the
time Peyton & Swap left it about \$300.00 and the
other two are log structures and are worth
about \$50.00 in the way of improvement of a
permanent character.

Peyton & Swap erected or caused to be erected a
rough stone chimney to a house built by a
man by the name of Kirk, and this chimney
I suppose is reasonably worth in the way
of improvement about \$15.00 or \$20.00 probably about
\$15.00 They also built two cribs ~~or~~ ^{or} stables, which
was probably worth about \$25.00 These with said
chimney are on the 800 acre tract & within the
city limits of "Cumberland Gap."

Crop examined

At the time the mill leased by Newlee & others to
Mr Peyton was being torn down Peyton & Swap
directed their hands who were engaged in taking
it down to use care, in doing so, that the

lumber and material might not be seriously damaged, and I have heard both Peyton & Swaff say more than once, that Mr John W. Newlee in his lifetime had given them permission to take down said Mill house but that they were to re-build the same a little higher up the stream so as to be out of the way of the furorace, And about the first work done by me for Peyton & Swaff was to get oak Cogs for the purpose of re-building said Mill, I was very well acquainted with said Mill before it was torn down, there was two sets of stones therein, one for grinding corn & the other for wheat and was regarded as a good mill for grinding & making meal & flour, there was in said Mill a Smith Machine a Screen a fan Mill, a bolting chest & cloth and elevators to carry the flour to the bolting chest &c, And upon the whole I am of opinion that said Mill was worth as it stood before it was taken down not less than about \$3000.00 and I am clearly of opinion that it would require at least \$2500.00 (judiciously expended) to replace the Mill, in the same condition it was in before it was taken down by Peyton & Swaff.

Peyton & Swaff both said to me that they were under obligations to re-build said Mill, and one or both of them just a short time before they left here said that they yet had to rebuild said Mill and intended to do so. Their

real intention was when they took it down to rebuild the same out of the same material a little further up the stream. But I never heard any contract between Mr Newlee in his lifetime, and Payton & Swaff or either of them in relation to taking down and rebuilding said Mill, and when speaking of their obligation to rebuild said Mill, Payton & Swaff said nothing about whether or not they were to be paid for the re-building of the same, but it was my understanding from all parties that they were to re-build it, for the privilege of taking it down and getting its site on which to erect said Bridge house.

The bridge left as it is called might have been erected without taking down said Mill and that course I advised to be adopted, but others thought it best to take it down and that course was adopted, I believe that the ~~is probable~~ Mill might have been left where it was without being in great danger of being burned down. Still there was some danger of its being ^{so} burned.

I was well acquainted with the Newlee Inn works property, just before Payton & Swaff leased the same & got the possession thereof, and I am well acquainted with the condition said property was in at the time Payton & Swaff left it, and looking at the Property as it was when it was

leased to them, with the mill in good order upon it, and its condition when they left it, destitute of the mill, and with all the improvements which they put upon it (and) my opinion is that said mill was really worth as much or more, than all the improvements placed thereon by Peyton & Swaff.

I do not consider that I am a good judge of some of the improvements referred to, such as the blowing cylinders, and the repairs on the stack & furnace, but still I form an opinion for myself in relation thereto.

The two houses built by Desmottimer on the Rose land were taken down by Peyton & Swaff and hauled here and used for various purposes in the way of improving the Iron works property. And the lumber in these two houses I suppose was reasonably worth about \$50.00

He examined in chief

Peyton & Swaff both told me, they were to rebuild said mill, and at the time they thus talked they had formed a partnership between themselves or at least they said they were partners and traded and held themselves out to the public as partners in business.

And further this witness saith that
gamey & green

Dr J Mc Harrison a witness for W. H. Newlee being sworn deposes and says

I was tolerably well acquainted with the Mill
torn down by Peyton & Swaff and I know
something of the improvements left by Peyton
& Swaff on the Iron works property. but I am
not well acquainted with said improvements
but from my knowledge of the Mill and
said improvements, for my use and perhaps
a large majority of the people of the country, I
would prefer to have the Mill than to have
said improvements, and if I owned the
new lee property, for my use I would
rather have it with the Mill as it was, as
to have it now distant of the Mill with all
the improvements made by Peyton & Swaff &
at the same time I suppose if I wanted to en-
gage in making Iron, I would rather have
the property in its present condition than
before the mill was taken down, so upon
the whole, I suppose that it would depend
somewhat upon the buyer, whether said
property is now worth more than when
the Mill was on its site, I suppose there
would have been some danger of the Mill house
being burned on account of its near proximity
to the top of the furnace, but at the same time
I think there would have been less danger of bur-
ning the Mill house where it was, than of
now burning the bridge house where it is & if
both were ^{there} and the bridge house should be

burned, the mill would necessarily be burned
also, And further this witness saith the note

J. M. Harrison

Henry T. Patton another witness for the defendants
being duly sworn says

I was living here when the mill referred to
in these depositions was built, and have been
in it often, I regarded it as a good mill
and it had a large custom, I also have
a pretty good idea of the improvements made
by Peyton & Swaff on the Iron works property
but am not a very good judge of the value
of some of said improvements, but were I
called upon to give an opinion as to the
relative value of said Mill and said impro-
vements, so far as I am concerned, I should
say for my use I would rather have
the mill as it was just before it was taken
down, than to have had the improvements
placed on said property by Peyton & Swaff at
the time they left it, but others might take
quite a different view of the matter

And further this witness saith the note.

Henry T. Patton

Hiram C. Wapman another witness for Defts. says

Mr Peyton at one time came to my house
and employed me to saw him a bill of lumber
which he said he intended to use in rebuilding
the Newlee Mill. He at the same time

said that he had promised Mr John E. Newlee to rebuild his mill and that he intended to do so, and that he intended to build a better mill than had ever been erected at that place, and one that would cost some \$3000.00 or \$4000.00 I did saw said bill of lumber for the purposes indicated, and it was subsequently levied on and sold for the debts of Peyton or Peyton & Swaff.

And further this witness saith not.

J. L. Wernan

Thomas L. Davis another witness for Duff Suggs.

In 1854 Newlee & Stiller first erected what is called the furnace stack, and I superintended its erection at the outset, aided in its construction from the digging out of the foundation to its completion including the iron wall hearth &c, and I then kept an account of the entire cost of the building thereof, and as well as I now remember its entire cost was a little over \$2000.00 but the precise amount I cannot now state. I have worked a great deal about iron furnaces, and I am pretty well acquainted with the work done by Peyton & Swaff in taking down the brick from the top of the stone stack taking down a part of the stone stack, taking out the iron wall, and rebuilding all of which, and my opinion now is that all of said repairs is reasonably worth from

\$250.00 to \$300.00 The brick wall on top of the Stone Stack is now a little higher than it was built by Newlee & Heller, but the only advantage that I can see the present stack has over the former one, is that it is some higher and the danger of setting fire to contiguous houses something less. Newlee & Heller erected what was called a bellows house which stood about where the Newlee Mill lately stood, but as to the relative heights of these two houses I do not remember, the bellows house stood for a good many years without being burned and was destroyed as I suppose during the late war. Since the war, but a good while before Peyton & Swaff leased the Inn works I examined the Inn Wall left by Newlee & Heller and at that time it was in a good state of preservation and I then saw but one defect and that was one stone pretty high up was out, and it was so high up that I did not think that it really injured the Inn wall but very little, as well as I now remember Newlee & Heller had used that Inn wall for some time but I thought when I looked at it that it would serve a good purpose for a good while longer.

With reference to the Mill for my use, my own opinion is that it was worth more to the property in which it stood as it was before it was torn down, than the improvements placed

therein by Messrs Peyton & Swaff other might
however entertain a very different view
of the matter.

Swaff examined

I did not examine said Iron Wall, at the
time Peyton & Swaff leased the Iron Works and
hence do not know its condition then, I do
not remember to have examined it but once,
^{since the war} and that was the time before referred to.

And further this witness says not.

Thos. L. Davis

Jabez Hopkins another witness for the deft says

I was Mr John G. Newlee's Miller at the
time Peyton & Swaff took down the same;
just a short time before the Mill was taken
down Mr Swaff and Mr Newlee met at
the Mill and a conversation then sprang
up between them with reference to the removal
of said Mill and during this conversation
Mr Swaff said he wanted to remove the Mill
and that if Mr Newlee would let him do
so he would take it down and re-build it
and make it as good as it then was and
Mr Newlee gave his consent to the taking
down and re-building said Mill upon
the terms proposed, and soon afterward
the Mill was torn down and has not been
rebuilt. I heard nothing said either way
about paying for taking down and re-building.

The Mill was a good flour and corn mill had a large custom and was comparatively new, and was well fixed with all or nearly all the modern improvements found in country Mills. And further this witness saith not.

Jabez ^{his} H. of Shenandoah
Mark
Virginia, Lee County, to wit:

The foregoing depositions were taken by me, sworn to & subscribed by each witness at the time & place and for the purposes mentioned in the Caption.

Henry J. Morgan, Comr.

Wheeler & Ball
vs 2 Depositions
Peyton & Swan et al

A.B.

Second

(5)

Testimony by The Defendant

Mr Gibson was not your mill
put up under the tub principle

and by witness IT was

Question by Same ^{Mr Gibson} Was not the cap mill a good
mill and by witness I think it was

Question by Same

Mr Gibson did not Dutton
and Swop have the lumber sawed at H &
Keromans for a mill wheel and did not have
it Levied on and had it sold as the property of
Dutton and Swop answer by witness

They said Will lumber sawed at said
mill and I had it Levied on and sold for my debt
against Dutton & Swop and it was said that
it was for the purpose of a mill wheel
and further this deposition saith not

H. S. Gibson

H. B. R. Newberry a witness for the Plaintiff
after being sworn upon and say

(C)

Question by Plaintiff

Mr Newberry you will please State what Peyton & Swap Stated to ^{you} in Relation to Taken the grist mill down at Cumberland Gap and the Cause for them Taken the mill down

~~Testimony~~ by witness

They Stated that the mill was in the way ^{building} of the Bridge left to get to the Stack and that they were ~~stayed~~ to turn it down and they also Stated that they had the privilege of building it further up the Branch and that they was going to build a good flour mill that they Peyton and Swap Stated that they got pay for all improvement ~~and~~ that there was no mill built

and further this deponent says not

W. C. Newberry

deponent to meet at J. S. Gibson June 9th 1877 for the purpose of taking G. H. Rose and H. C. Willis & P. H. Gibson

deponent to agreement met at J. S. Gibson the 9th day of June 1877 He G. White a witness for the defendants after being duly sworn deposed

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as follows.

Question by defendant Mr. White are you a stone mason and are you not a judge of Masonry work

Answer I am a stone mason & think I am a judge of masonry

Question by same Have you not put in several inwalls and assisted in repairing furnaces

Answer I have put in 2 inwall or was part man on 2 jobs at the bridge

Question by same. Did you not assist in putting in an inwall into the Cumberland Gap furnace

Answer I did

Question by same Have you examined the inwall and repairs on furnace and chimney on furnace stacks at Cumberland Gap as repaired by Peyton & Swap - If so state and what would be a reasonable amount for said repairs.

Answer in my judgment I think the in wall to gether all the repairs on stacks could be made for ~~two hundred~~ ^(this) hundred & \$15.00 or \$300 dollars I have made ^{the} estimate from work that I have

done on Furnace Stacks

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Question by same Did you examine the old inwall that was in the furnace when Peyton & Swap leased the Gap Furnace. If so state its Condition Answer I don't Recollect Condition of said inwall

Question by same, If Peyton & Swap had expended a thousand Dollars in repairs on furnace and had not increased its Capacity in making iron would you consider said repairs an improvement Answer as long as such Repairs had been ^(done) profitable it would be no improvement
Question by Plaintiff

Mr White did you keep the Book about of the cost of repairing of said Stack so as to know the precise cost of said repairs

Answer I did keep only on my own part but taking my own wages in to consideration & knowing what other men worked as I think I know I do not in my cheap estimation will take the expense of said Repairs

question by some
 doo you know ~~how~~ ^{any} Lenght of time
 they were repair of that stock how many
 hands the worked how many feet they
 tore it down and how much higher
 they build said stock ~~the~~

And I doo know what Lenght of time the
 worked nor ~~what~~ how many hands worked at the
 time said in wall & stock was built I only
 estimate the expence of said work from my
 experience of such work I have bin working at
 Stone & Brick work for 24 or 30 years & think
 am a competent judge of such work
~~I suppose the stone work done at top of stock is 24~~
 I never measured the work done at the top of
 said stock I have looked at said ^{work} & think I could
 accomplish the same work for the above mentioned
 sum of 275 or 300 I don't know how what high
 the wall was taken down I only looked from the
 ground I don't know how many feet it is built
 higher than it was

(10) ~~question~~
question by some
do you know ^{how} many feet high said in
wall was built how many feet ⁱⁿ circum-
ference round how thick said wall is

Answer my Recollection is that at the Bottom of the
Bosh it is ^{it would make 27 ft diameter} 9 ft a cross at top a haire 2 1/2 or 3 ft
at top in diameter
probably 25 or 27 ft high

question by some
did ever hear Peyton or swap say what
said repairs on said stack cost them
Answer I know as I Recollect?

question by some
was not provision higher in that year
than they commonly are and would no way
make Labor some higher

Answer I don't Recollect?

question by some
do you know after said repairs on said
stack ^{stack} did or did not make more iron

Answer I don't know any thing about the making of
iron

(11) ~~question~~
question by some
did they not have to take out the inwall
you assisted in putting in said stack

Answer I don't know as my own knowledge I wouldn't stand
that did

question by some
do you know for what cause they had
to take it out

Answer I don't

Question by Defendant. Did you not put in an
inwall at Speedwell Tennessee for Messrs. Rose, Woodson
& Harrison. Was it not larger in diameter at
the boshes, and a higher furnace than the Gap
Furnace

Answer I did it was a larger inwall &
higher furnace farther this depends on the size of it

Hugh B. White

Jonathan Thompson a witness for the defendant
after being duly sworn deposed as follows

Question by Defendant

Did you haul corn and oats from the
Rose property as rental to Peyton & swap did they
not get the corn & oats from Messrs. Howard & Bedford

(12)

and did you not assist in hauling a large lot of Hay from the Meadow of Newell & Howard to the Stables of Peyton & Swap

Answer by witness I did haul Corn and out from the Kato property, also hay from the meadow between said Howard then was some 25 or six loads of Corn from the Kato property, and four loads of oats I only hauled one year from said property. Question by Plaintiff Was not the Corn that I spoke of above. Very unaltered Corn and in the Shuck also but one load. Answer It was I do not know the number of bushels of Corn that was or oats I don't know whether they paid for it or not. Further this Deposition says not Johnathan ^{his} Thompson ^{made}

C. J. Mills a witness for the Defendants after being duly sworn Deposition as follows

Question by Defendant. Was you a laborer employed by Peyton & Swap, and did you assist in tearing down the Mill at the Gap

Answer I was employed by Swap and

(13)

asked meaning about the mill

Question by same. What was the instruction about taking down the mill in regard to the lumber &c. Answer The instruction was to take it down carefully and pile it up that he was going to build a ~~new~~ ^{new} mill at site in another place just about the same distance as it was or better according to the contract with Mr Newby

Question by same. Did not Peyton & Swap use nearly all the lumber of said mill and did not Mr Peyton give you a bill of lading to do to replace in mill and say he was going to rebuild Answer by witness they did

Question by Plaintiff Mr Mills. do you know whether Dator & Swap were to have pay for rebuilding ^{the mill} or not Answer I do not know they were or not but they were built and further this deponent says not
C. J. Mills
mark

(14)

Virginia Lee County Court
I do Certify that I am an acting Justice
of the peace for Lee County Virginia do Certify
That the deposition of A L Hoadson J A
Hamilton Robt Green J S Gilson ^{Wm} H. C. B
Newberry H L White Johnathan Thompson
and C J Mills was duly taken depoted and
and sworn to and subscribed before ^{me} at the
time and place ^{four} set forth for the purpose
named in the Caption Given under my
hand this the 9th day of June 1877
H. C. Killis J. P.

To H. C. Killis Justice of the peace
for taken deposition \$5.00

Wheeler + Bull
vs { Depositions
Peyton + Swaff etals.

AC.

Third

Commissioner's Office, Jonesville Va June 13th 1877.

Wheeler + Ball

Plffs

vs.

Defts

In Chancery.

Peyton and Swap et als.

To Hon. John A. Kelly, Judge of Circuit Court of Lee County:

By a Decree entered in this cause previous to this date I, as a Commissioner of this Court, was directed to enquire whether the Iron works levied on by Plaintiffs' Attachment lay wholly or partly in this County, and if partly to what extent, and to take an account between the representative of Charles Peyton and William W. Swap and the Defts Demottimer, Howard, Bedford, and the representative of John G. Newlee dec'd, ascertaining whether or not there being anything due the said Charles Peyton or to said Peyton + Swap, growing out of the lease of said Iron works &c. In order to execute this Decree sometime before the 25th day of May 1877. I gave to the Plaintiffs and to William H. Newlee who is Superintending the defense in this cause, notice that on the 25th day of May I would be at Cumberland Gap, for the purpose of making said enquiries, and I accordingly arrived there on that day, and was met by the Plaintiffs and their Counsel Mr Miller, with William H. Newlee together with quite a number of witnesses, and on that and ^{the} following day I took the depositions of said witnesses and herewith file the same marked A.B. The depositions thus taken were those of Samuel G. Shumate, Wm C. R. Newberry,

Thomas Mosier, B. F. Gulley, and James F. Snellan
for the Plaintiffs, and those of J. M. Harbeson, Henry
F. Patton, H. C. Weirman, Thos. L. Davis, and Jabez
Hopkins for the Defendants; and these being all
the witnesses then in attendance I left there and
came home, with the understanding however that
the parties were to go on in the taking of the evidence
of a few other witnesses and forward the same to me
which they did, and I herewith file ^{the} same marked A.C.

Several years before September 1872 John H. Newlee
now dec'd, was the owner of a large body of land
lying near Cumberland Gap, consisting of something
like 875 or 880 acres, according to the estimate of Mr
Mr H. Newlee, about seventy-five or eighty acres of which
lies on the Virginia side and in this County, and the
residue of about eight hundred acres lies in Tenn-
see, and in Claiborne County.

Sometime, it is not known when, prior to the lease
mentioned in this cause, said John H. Newlee
sold or contracted to sell to one Edward ⁱⁿ ~~and~~ Remortimer,
an undivided moiety of said lands including
the Iron works and such other machinery as stood
thereon for the sum of ten thousand dollars as it is
said, but when pay-day came around said Re-
mortimer failed to meet his obligation, but unwilling
to surrender his contract he procured, it is said, P. C.
Bedford, and Presley A. Howard or one of them to
pay Mr Newlee said ten thousand dollars with its
interest, and thereupon Mr Newlee executed to

Bedford & Howard or one of them a deed for an undivided moiety of said property, and this deed, if I have not forgotten was executed to Mr Bedford but it may have been to Mr Howard, but I was informed by Mr H. Newlee it was executed to one or the other. If this is true and I have but little doubt it is, still I suppose Demortimer and Howard claim some sort of an equitable interest in said Bedford's undivided interest, if for no other reason that they joined with him & Newlee in the deed of lease to Charles Peyton dated Sept. 10- 1872 and filed as an exhibit in the cause, and if we look alone at this deed of Lease it would seem that John G. Newlee, Edwin Demortimer, Paul C. Bedford, & Presley A. Howard were the joint owners of the property referred to in said lease.

The said Edwin Demortimer after making his purchase of Mr Newlee, no doubt entertained grand ideas as to what he was going to make the Gap property, and as an evidence of this he laid off into lots, streets, and alleys a considerable part of said land, and called it the City of Cumberland Gap, and he also commenced and partly built several houses thereon, and repaired said Iron works to some extent.

Said Demortimer also purchased ~~another~~ large tracts of land near to or adjoining the Newlee property of a Mr Rose, and upon it erected two houses.

I have mentioned these several particulars because

the matters of account, hereafter referred to, have some connection therewith, and as serving to throw some light upon some of the language used in the Deed of Lease.

The first clause of the Deed of Lease bearing date Sept. 10th 1872 between Newlee, Demottimer, Bedford & Howard of the first part, and Cha^s Peyton of the second part provides thus: That the parties of the first part have this day leased to Charles Peyton party of the second part for the term of five years from this date their Iron works property located at Cumberland Gap Tenn and known as the Newlee Iron works, the said Iron works property consists of a blast furnace, foundry, flouring mill and store house, and one block of land supposed to be fifteen acres more or less all situated within the city limits of Cumberland Gap Tenn.

The fifteen acres of land here referred to is a part of the said 75 acres tract lying in Virginia, and on said 15 acres is situated the said Iron works property the store house and flouring mill, and it also lies within what they call the City limits as I was informed while there.

The said parties further provide by said 1st section: That the parties of the first part do grant to the party of the second part the water power on said premises so as ^{not} to interfere with the Carding machine and Saw-mill, or so much thereof as may be necessary to run said furnace and mill during the term of said lease.

The water power here referred to heads up on the side of the mountain, runs southward along the East end of said 15 acres, furnishes power for running the Iron works, and then runs on down to the Va. & Penn line where it furnishes power for running the Carding machine and Saw-Mill.

Said Contract further provides That the parties of the first part lease to the party of the second part for the same period the Coaling and ore-privileges on the 800 acres of land situated at Cumberland Gap and on which the City of Cumberland Gap is located, but the parties of the first part reserve all the land upon which said City is located except the said 15 acres, and they also reserve fuel for the use of four families. This last provision is a little ambiguous but I think it means about this, that the parties of the first part granted to the party of the second part the use of all the timber and iron ore on said 800 acre tract except such ore & timber as might be on that part covered by said imaginary City outside of the said 15 acres.

The 2nd clause of the Contract provides that Chas. Peyton shall complete the buildings necessary to carry on the business of manufacturing pig-iron and casting at his own expense, and to proceed immediately to repair the Iron works, and as soon as such repairs can be made to proceed to the manufacture of iron and castings, and after paying all the actual expenses of manufacturing

pig-iron and castings, and in addition thereto said Chas. Peyton is to retain \$3500.00 per year the salary of said Peyton and two others that he will account for and pay over to the parties of the 1st part one equal half of the nett proceeds of the pig-iron and castings made at said furnace and iron works during the period of this lease, to be divided ~~between~~ them according to their respective interests. It is not contended by Newlee or any of the parties that there was any profit made to be divided, but upon the contrary Chas. Peyton and his partners swapped left, Cumberland Gap, largely indebted to the people there amounting to somewhere between \$12000.00 and \$25000.00.

The 4th clause of said Contract relates to privileges of hauling over the lands coal, iron, and their products to market.

By the 5th clause of the Contract, it is provided that Newlee, Demottimer, Bedford & Howard shall pay Chas. Peyton for all permanent improvements made to the machinery, and for all buildings which he may erect of a permanent character upon said premises, and he shall be paid the full value of said improvements at the expiration of the lease, and the subsequent part of this clause provides for the mode of ascertaining the value of such permanent improvements, and it is conceded by all the parties that the mode therein provided for has not been pursued in this case.

The 6th clause of the contract provides for the termination of the lease at an earlier period than that fixed by the first part of the contract if the said Chas. Peyton should see proper to terminate it an earlier period by giving such notice as is therein required and touching that matter it is admitted that said Chas. Peyton and his partner W. W. Swap, after testing said Iron works 2 years & incurring large debts in the meantime, ran away from Cumberland Gap in the night-time without giving the notice contemplated by the 6th clause of the contract.

Soon after the contract between these parties was entered into, and before any work was done, it is said that the said Chas. Peyton took in as his partner a son-in-law - the said W. W. Swap. I shall therefore in the subsequent part of this report consider Chas. Peyton and said Swap as being entitled to ^{value of} any improvements and to be liable for any damages growing out of the original contract.

The said Peyton and Swap being indebted to the Plffs Wheeler & Ball in a large sum, they have filed their Bill alleging that Newlee, Demortimer, Bedford, & Howard are indebted, under the 5th clause of said contract to Peyton & Swap for permanent improvements and are seeking to be substituted to their rights against Newlee & others, and ~~at~~ the decision of the question whether or not Newlee & others are indebted to Peyton & Swap for permanent improvements ^{& the value thereof} as all that now remains to be settled in this suit.

Was there nothing else involved in such enquiry

save the mere enquiry whether or not such improvements were made, I should say at once from the evidence & from a personal inspection thereof that such improvements have been made, but looking at all the facts in the case, it is . . . to my mind . . . altogether questionable whether ~~there is~~ ^{there are} any thing to Peyton & Swap on account of such improvements, at the time that Peyton & Swap leased said 15 acres there was situated upon it a Store House, a large Coal-Shed, a Grist-Mill, a Blast-Furnace as it is called, & Foundry; as to the Store House no improvements have been made thereon, & instead of adding improvements to the mill it has been torn down & not rebuilt, but as to the Coal-House, Blast-Furnace & Foundry, some improvements have been made thereon, & in addition to these Peyton & Swap erected a small Cupola for the purpose of mouldering hollow ware & they also bought & put up at their own expense a pair of what is called Cast Blowing cylinders put up considerable frame work to support & operate the same & they also constructed what is called a Bridge Loft & made quite a number of what are called Moulding Flasks at their own expense.

As to the improvements connected with the Coal-House, they consist of 3 Sheds on 3 sides thereof which were erected by Peyton & Swap at their own expense, but these I regard as mere temporary structures & can scarcely be regarded as permanent improvements, I shall therefore not consider them of any value.

The Blast-Furnace or Furnace Stack as it is sometimes called is a huge pile of rock erected on the

The Blast-Furnace or Furnace Stack as it is some times called is a huge pile of rock erected on the

- 9) mountain side, in which the coal & Iron ore is put and the latter "melted", it is some 40 or 50 feet in height, at the base it is from 16 to 20 ft square, with a large flue or hollow on the inside, it is built up some 35 or 40 feet with stone gradually tapering from the base to the top, upon the top of this stone wall it is built some 10 or 15 feet with brick, with a large door or opening on the North side of this brick wall; and the Bridge Loft or Bridge House, before spoken of, leads or extends from the mountain side above to the top of said Stone wall & to the opening in the Brick part of said stack and it is on this Bridge Loft that the coal & Iron ore is conveyed to the top of the furnace & is there put into the furnace at the top of the stone wall. I have before stated that this outer Stone wall contained a large cavity within & in order to make this outer wall proof against fire, there is constructed within said cavity what the Iron workers call an "In-wall", this In-wall commences within a few feet of the base of the outer wall & extends to the top of the Stone-wall gradually tapering from the base to the top, and the space between this outer & in-wall is filled up with dry sand, this in-wall at its base is about 9 feet in diameter at the base and tapers to about $2\frac{1}{2}$ feet at the top, and is about 27 or 28 feet high, & is constructed of tolerably well-dressed sand stone. Many years ago said Furnace Stack & In-wall was built by Newlee & Heller for the purposes of manufacturing Iron & Castings, and was thus used until about the commencement of the late war, but from that time until about the time that Peyton & Swap

commenced using it, it remained idle. There is no evidence in the cause shewing with anything like certainty the condition of said Furnace when Peyton & Swap leased it, but before they commenced using it, it was thought by them to be necessary to take down the brick upon said stack & to take several feet off of the said stone stack, to take out the entire In. wall, and to rebuild the same, which they did.

The witnesses who testify with reference to the work done upon the stack, Inner wall &c. differ considerably in their judgment: Mr Shumate thinks it worth about \$1200.⁰⁰, Mr Mosier thinks it worth about \$1000.⁰⁰, while Mr Davis thinks it worth \$250.⁰⁰ or \$300.⁰⁰ & Mr White thinks it worth \$275.⁰⁰ or \$300.⁰⁰ & the latter two it will be observed have had some experience in the erection of such structures.

Now, when it is considered that the stack & Inner wall were already there when Peyton & Swap got possession of it and it not being shewn that the present stack, In. wall &c. is better than the one that was there when they leased it, I am strongly inclined to think that the greatest sum that ought to be allowed on account thereof would be \$300.⁰⁰, that on account of the construction of what is called the Bridge Soft about \$200.⁰⁰ ought to be allowed as such might be considered a permanent improvement.

As to what is called the Blowing Cylinders which is to make the wind for the blast to the furnace

these are but two witnesses who testify with reference to their value, one of these witnesses thinks they cost about \$600.⁰⁰ & it is shewn that they were hauled from Estill County Ky, they are thought to weigh about 9000 lbs. & are put up on substantial & solid frame work about 20 or 25 feet from the ground, & a large water-wheel has been constructed to work the same over which & said cylinder there is a good roof supported by substantial frame work.

From the evidence in the cause, I am inclined to think that the Blowing Cylinders, the frame work supporting them, the roof covering the same, together with the construction of the water-wheel that works said Blowing or Wind fixtures might be considered as adding to the Newlee property \$1000.⁰⁰ in the way of permanent improvements. +

The evidence also shews that Peyton & Swap also erected a small Cupola for melting old broken castings & for re-moulding small hollow ware such as pots, ovens &c.

The evidence further shews that Peyton & Swap also constructed what are called the moulding Flasks perhaps about 75 in number, these flasks are wooden structures made for the purpose of moulding plow moulds plow-points, stoves, wagon-boxes, kettles, pots, ovens, skillets &c. and these articles together with said Cupola are shewn to be worth about \$75.⁰⁰

The principal lease heretofore referred to is the 15 acres of land on which is situated the furnace Foundry, mill and store-house, but in addition

thereto Peyton & Swap were granted certain privileges on the 800 acre tract on the Tennessee side, and by another provision of said contract it is stipulated that Peyton & Swap are to be paid for any improvements put up by them on the leased premises.

Now, upon the said 800 acres tract Peyton & Swap erected 3 houses, one a sort of box-house with front & ell & two chimneys. The other two are log structures. They also erected a rough stone chimney to a house built by a man by the name of Kirk, and they likewise built two cribs & a stable, all of which are on the 800 acres tract & within the city limits.

Now, the evidence touching these improvements shews that the house with front & ell is worth \$300.⁰⁰ that the 2 log houses are worth \$50.⁰⁰, the rough stone chimney worth \$15.⁰⁰ & the 2 cribs & stable worth \$25.⁰⁰

Now, Mr Newlee who is acting for his father's ^{estate} & others claims that they cannot be charged with any improvements made by Peyton & Swap on the 800 acres tract, for the reason that the contract says that Peyton & Swap are to be paid for all improvements put upon the premises & that the premises thus referred to is confined to improvements put upon the 15 acres, but my opinion is that the word premises as thus used in the Contract includes certainly all improvements put upon the 15 acres tract & also all improvements put upon the 800 acres tract, because as to the 15 acres that was an absolute lease & as to the 800 acres certain privileges were granted thereon, then following

certain privileges were granted thereon, then following

13) these two agreements by the party of the first part the 5th clause of said contract provides that the party of the 2nd part shall be paid for all improvements of a permanent character upon said premises, what are said premises? evidently to my mind the 800 acre tract as well as the 15 acres & hence in a statement of account hereafter referred to I have charged the items for improvements upon the 800 acres as well as for those upon the 15 acre tract.

The matters now passed upon constitute about all of the improvements seen by me or deposed to by witnesses, and I now file herewith a paper marked A.D. on which is stated in the form of an account the several items for permanent improvements corresponding with the foregoing report and by reference thereto it will be seen that the value of the several items of improvements as herein reported amount in the aggregate to \$1965.⁰⁰

I have before remarked that Demotimer had bought another tract of land of a Mr Rose & had erected thereon two houses & the evidence in this cause, to wit: that of Mr Snellan shews that Peyton & Swaff took down said two houses & hauled the same to the Gap & used it towards the improvement of the Iron Works property. The lumber of said two houses Mr Snellan shews was reasonably worth \$50.⁰⁰, and it is alleged that these houses were taken down by Peyton & Swaff without the knowl-

edge or consent of the owners thereof, and having already allowed Peyton & Swap for permanent improvements partly made out of the lumber of said houses, it is but fair & right, according to my judgment to require Peyton & Swap to account to the other party for the value of the lumber thus obtained, and I shall accordingly so act.

It will be remembered that on said 15 acres of land there was a mill which was leased to Peyton & Swap for 5 years, the mill thus leased the evidence shews was torn down by Peyton & Swap & the timbers which composed a part of the mill house were used in the construction of the Bridge Sift & the frame work around & supporting the Blowing apparatus & having made an estimate in favor of Peyton & Swap of the value of said Blowing apparatus & frame work as it now stands, it seems to me right & proper that Peyton & Swap should account to the estate of Newlee & others for the mill timbers used as aforesaid which the evidence shews to be \$25.00

Mr Wm H. Newlee claimed before me that Peyton & Swap during the time they were at the Gap got a large lot of corn & oats from what is known as the Rose Property & a large lot of hay from his father's meadow, all of which belonged to the parties of the first part to the Contract, and that they had not received any pay therefor as yet.

But the evidence which he has adduced in support of these items is altogether meagre & unsatisfactory, a witness however, one Jonathan Thompson, (see Depositions A & B) states that he did haul corn & oats from the Rose Property to Peyton & Swaff & that he hauled hay from the meadow of Newell & Howard to them, he gives no idea of the quantity of hay he thus hauled either by the load or otherwise and as to the corn & oats he says he hauled 25 or 26 loads of corn & 4 loads of oats, but he makes no estimate of the number of bushels of corn nor of the number of dozen of oats, nor does he say whether they were 2, 3, or 4, 5, or 6 horse loads and it also appears that the loads of corn hauled by him were all unhusked & were of rather inferior quality, nor is there any proof shewing what the corn & oats &c. were worth by the bushel, dozen, pound, or otherwise, but were I called upon to make an estimate of the value of these articles I should proceed thus: I should say that each load of corn ^{in the husk} would make about 12 bushels & there being 25 loads would make about 300 bushels altogether. I would then suppose that there was about 25 doz. in each load of oats which make an aggregate of 100 dozen thereof, & I should then guess that there was as many loads of hay as oats, & proceeding further to guess at the value of each of each of said commodities, I should say that the

4 loads of hay were worth \$7.50 per load making \$30.⁰⁰, that the oats was worth 20 cts per dozen making \$20.⁰⁰ & that the corn was worth 40 cts per bushel making \$120.⁰⁰.

x Now, these matters constitute all the matters of Debit & Credit between the parties, except a question that arises with reference to said mill which will hereafter be considered; and to the consideration of that matter your attention is now directed: it will be remembered that Newlee & others leased to Peyton & Swap the mill, along with other machinery on the 15 acres, the evidence in the cause shews that this mill was a good one, that there was in it two sets of Runners one for wheat & one for corn, that it had in it all the modern improvements used in Country Mills, such as Smut-mill or Screen, bolting chest & cloth, Elevators &c.

One witness thinks that this mill must have cost Mr Newlee in its erection \$3000.⁰⁰ & he then says it would require the judicious expenditure of at least \$2500.⁰⁰ to erect as good a mill as it was before it taken down; an other witness that the mill was worth \$2000.⁰⁰, while another says it was worth \$1500.⁰⁰.

It is a conceded fact that Peyton & Swap took down said mill, and Mr Wm H. Newlee, the agent of John G. Newlee's Estate, Demostimer & others, says that his father, John G. Newlee, gave his consent that said mill be taken down upon con-

17) dition that Peyton & Swap should re-build as good a mill as it was a little further up the stream, so as to be a little further off from the furnace, while the Plffs say that it is true that Peyton & Swap were to take the mill down & remove it higher up the stream, but that John G. Newlee Howard, Demortimer, & other were to pay them for its re-construction, & that such removal was absolutely necessary to keep said mill from being burned up, on account of its close proximity to the furnace.

There is but one witness who heard any conversation between John G. Newlee & Peyton & Swap or either of them, in relation to said mill i.e. Jabez Hopkins who testifies that Mr Newlee and Mr Swap had a talk about the mill, and that Mr Newlee gave his consent to its removal higher up the stream provided Peyton & Swap should re-build the mill as good as it was at that time; and several witnesses heard Peyton & Swap say on sundry occasions that they were to re-build said mill a little higher up the stream, while one witness says that Peyton & Swap ^{said to him that they} were to rebuild said mill, but that Newlee & others were to pay them for its removal and reconstruction; and two or three other witnesses testify that they were employed by Peyton & Swap to get out some of the timbers for the purpose of re-building said mill, but they did not hear any part of the contract between the parties in relation to the

terms upon which the mill was to be taken down
& rebuilt. It is a fact admitted by all
that the mill has not been re-built altho' taken
down as aforesaid.

Nearly all the witnesses who testify in relation
to the matter say, that for their purposes they would
rather have the Newlee Iron works property, as it
is called, in the condition it was when Newlee
& others leased it ^{with the mill on it}, than to have it with such im-
provements as Peyton & Swap had put upon it
when they left it destitute of the mill, and this view
of it corresponds with my own judgment of the matter.

There is no evidence shewing what the net in-
come of the mill was per year, but I should think
from what I have heard millers say in reference to
such matters that the mill would ^{have yielded} somewhere between
\$500.⁰⁰ & \$1000.⁰⁰ per year as net income.

The Plaintiffs together with their Counsel say that
if the estate of John G. Newlee, Demortineer & others have
in fact a cause of action against Peyton & Swap
for their failure to re-build said mill, that such an
action must of necessity be purely an action for Dam-
ages, and that as they are proceeding in this cause
upon a written contract by which John G. Newlee & others
undertook to pay Peyton & Swap for permanent improve-
ments, that the value of such permanent improvements
cannot be offsetted by a plea of such demand for
Damages.

It is possible that this ground taken by the Plffs would be true in an action-at-law, but I do not believe that it is the law in this particular case, because this is a suit in Equity & the Plffs having invoked the intervention of a court of Equity, the rule is that he who seeks must do Equity, the Plaintiffs occupy no more favorable position than Peyton & Swap would - were they here prosecuting this suit. Now, let us suppose that Peyton & Swap were in fact the Plffs in this suit seeking to recover from the adverse party pay for permanent improvements which I have ascertained to be \$1965.⁰⁰, then suppose that Newlee & others should admit that said improvements were of that value but at the same time say you have damaged us by taking down our mill & failing to rebuild the same, according to your contract, to an amount at least equal to what we owe you for improvements, then let us suppose further that Peyton & Swap are insolvent and that the other parties are solvent which I suppose is true altho there is no evidence shewing such to be facts, what ought a Court of Equity to say to parties thus situated? would it say to Peyton & Swap who are insolvent "go on & collect your demands from a party who is solvent" & then say to the solvent party "I will turn you over to your action-at-law to prosecute a suit for damages against an insolvent party. Such it seems to me would not be the view taken by a Court of Equity, but that it would say to the parties "I will do justice between you, I will off-set one demand with an

other, and give judgment according to the very right of the case.

The Pliffs further say that it is unreasonable that Peyton & Swap should taken down & rebuild said mill without being paid for so doing. Well that would certainly be true under ordinary circumstances, but in that connection it must be remembered that Peyton & Swap were the lessees of the mill & were to have its profits for five years, they therefore had an inducement to rebuild said mill in order to get its profits, but how was it with the owners of the mill? they had just recently erected the mill at a heavy expense, it was said to be in successful operation at the time, they no doubt calculated that it would be surrendered to them at the end of the 5 years, then under these circumstances why would the owners give their consent to the taking down of the mill, that they might have the pleasure of paying for its reconstruction? when they were not to be profitted thereby to the value of one farthing? The proposition that Newlee & others were to pay for the re-building of said mill is, to my mind, unreasonable, and besides it is not sustained by the proof. Newlee & others did lease said mill for 5 years & thereby surrendered to Peyton & Swap the profits thereof, but they no doubt did so with the expectation that the profits that they would realize from the manufacture of Iron would far exceed the profits of said mill, but

21) the sequel has proved 1st. that Newlee & others are minus the mill, 2ndly. that they have lost the profits of the mill from the 10th of Sept. 1872 to the present time & 3rdly that such Iron ore, wood & material as have been used by Peyton & Swap has also been a clear loss to them, for from the manufacture of Iron, from which they expected a revenue, they have not received one farthing, yet under all these circumstances if the claim of Newlee & others ~~claim~~ for damages arising from the failure of Peyton & Swap to rebuild their mill cannot be allowed in this suit as an offset to Peyton & Swap's demand for compensation for improvements then they will still have to pay a considerable sum in addition to the loss already sustained by them.

I have now reviewed the various matters which are, to my mind, connected with this suit and I have given my opinion thereon, and it now only remains for me to respond in a condensed form to the requirements of the Decree under which I am acting, and in doing so I will here state as the summing up of this report that the Iron works property levied on under the Plffs' attachment lies wholly in the County of Lee, State of Virginia; and 2ndly, That, in my opinion, upon an equitable & fair settlement of the matters involved in this suit, there is nothing due or owing to Peyton & Swap or either of them from the estate of John G. Newlee, Demostiner, Bedford & Howard or either of them.

But, as has been seen, I have reviewed each item of account between the parties, so that if I have erred in my judgment with reference to the damages for the failure to rebuild said mill, the Plffs will have the benefit of my estimate of the various items & the Court have enough before it to enable it to finally dispose of the cause.

On looking over the foregoing report I find that I have not given my opinion based upon the evidence, as to what John G. Newlee & others are entitled to from the failure of Peyton & Swap to rebuild said mill, nor have I expressed any opinion, based upon the evidence, as to whether they were to take it down & rebuild it without compensation, and to do so, I will here state that my opinion is that they were to take down & rebuild said mill without pay & that to have rebuilt as good a one as the one taken down, would have been worth as much as \$2000.⁰⁰ This estimate is a mean between the highest and lowest estimates of the value of the mill as fixed by three or four witnesses.

Now, on paper A.D., I have shewn the several items and the value of the permanent improvements which amounts, as before stated to \$1965.⁰⁰ and if the only credits that can be applied thereto in this suit are the value of the mill house lumber, the value of the lumber of the two houses removed, & the value of the corn, oats, & hay as estimated

by me, then it will follow that the estate of John
H. Newlee, Demortimer, Bedford & Howard will owe
Peyton & Swap a ballance of \$1720.⁰⁰ with interest
from, say August 1875; but if Newlee, Demortimer
& others can successfully charge Peyton & Swap
in this suit, as I think they can, with Damages
of \$2000.⁰⁰, as estimated by me, then Peyton & Swap
will owe them \$280.⁰⁰, with interest from the same
time, all which is shewn on said paper A.D.

If my estimate of the Damages for failure
to rebuild said mill is too much, I suppose it
would not be contended that \$1720.⁰⁰ under
the proof is too high, and that sum would be
sufficient to discharge the ballance for permanent
improvements.

All which is respectfully submitted.

Henry J. Morgan, Comr.
for

(13)
Wheeler & Ball

vs { Commissioner's Report.

Peyton & Swap et als.

Filed June 25th 1877.

R W Orr J. C.

Commissioner's Fee \$45.00

H. J. H.

Statement.

Seal	5-0
Affixing Seal	5-0
Clerk's Certificate	\$0
Quotient Fee	5-0
Deputy Sheriff Serving Process	5-0
Stamp Papers	20
	5-0

R. W. McKee

Wheller & Ball

vs. } Statement
} of Costs.

Payton Swank
& others

X

July 19th 1875 Memorandum, of Lis Pendens,
and attachment in equity against nonresidents,
and also attachments at law against nonresidents.

James M. Wheeler and Moses S. Ball
merchants and partners in trade
under the firm name and style
of Wheeler and Ball

Complainants

Against

Charles Peyton and William W. Swap
and the said Charles Peyton and
William W. Swap partners in the
trade and business of making
iron and castings under the
firm name and style of Peyton
& Swap and Presley A. Howard
Edwin Demortimer, Paul C. Bedford
William H. Newlee administrator of
the estate of John G. Newlee decd.
in the State of Tennessee and Thomas S.
Ely Sheriff of Lee County and as such
administrator of the estate of John
G. Newlee deceased and said William G. Newlee
Dr. John W. Divine and Adaline Divine his wife and
Jacob Slaughter & Eugenia Slaughter his wife heirs
of John G. Newlee deceased and William G.
Brown and Alexander L. Greer

In a Bill in Chancery and Attachment
in equity pending in the Circuit Court
of Lee County Virginia.

Defendants

The General object of this Suit in equity and the attachments issued in the Same is to recover from the Defendants Charles Peyton and William M. Swap a debt due by note from them to Complainants Wheeler and Ball amounting to \$3316.79 and due June 18th 1875 - together with interest from that date and to subject the Debts and other liabilities due and to become due to them from the other Defendants in this Cause, ^{or any of them} and to subject the real and personal estates of the Defendants to the payment of Said Debt and note which real and personal estates, debts and liabilities have been attached for that purpose in this Cause which is pending in the Circuit Court of Lee County Virginia. The real estate hereby attached and to be subjected in this Suit to the payment of Said note debt and liability lies at and near Cumberland Gap joining Tennessee and including the iron works furnace fixtures and machinery thereon including also the Grist and Saw Mills and every thing belonging to the real estate on Said land it being the same tract of land owned by ^{Said} John G. Newlee's heirs and Presley A. Howard Paul C. Bedford and Alexander L. Greer and leased to Said ^{Charles} Peyton & ^{Wm. M. Swap} in part and all the personal property be

longing to Said Defendants or either of them and this Suit and attachments are intended to effect their estates so far as they own and are entitled to Said real and personal estates and also the real and personal estates of John G. Newlee deceased in Lee County Virginia and ⁱⁿ the State of Tennessee and the estate of Edwin Semortimer, ^{and William G. Brown} And this memorandum is left with the Clerk of the County Court of Lee County in which the land is situate who shall forthwith record the same in the Deed Book and index the same by the names of the persons aforesaid. Given under our hands this the 19th day of July 1875-

James M. Wheeler }
Moses S. Ball }

merchants and partners in trade
under the firm name and style
of Wheeler & Ball.

By their attorney
David Miller,

Virginia.

Lee County Court Clerk's office the 7th day of August 1875.
The foregoing memorandum of Dispenders was this day filed in this office and admitted to record.
Teste John R. Gibson Clk.

(D-1)
Wheeler & Ball
vs. { memorandum
of attachment
& lis pendens
Peyton & Swaff
& others

Recorded in deed book
No 17. Page 355-6.

John R. Gibson Del.

Aug 7th 1876

Know all men by these presents that we
James M. Wheeler and Moses S. Ball ^{of Lee County Virginia} ~~of Lee County Virginia~~ are held and firmly
bound unto Charles Peyton and William
M. Swaff of Claiborne County Tennessee in
the just and full sum of Seven Thousand
Dollars lawful money of the United States
for the true payment of which we hereby
bind ourselves and our heirs &c. jointly
and severally and firmly by these presents
and we hereby waive the benefit of our
homesteads and personal property obligation
as to this bond and obligation. Signed with
our signatures and Sealed with our Seals on
this the 19th day of July 1875.

The Conditions of the above obligation
are such that whereas the above bound James
M. Wheeler and Moses S. Ball as merchants
and partners in trade under the firm name
and style of Wheeler & Ball have this day
instituted a suit in Chancery in the Circuit
Court of Lee County against the said said
Charles Peyton and William M. Swaff and
others for the recovery of a debt of \$3316.79
with interest thereon from June 18th 1875
till paid and upon their affidavit an
order and attachment in Equity was is-
sued and endorsed on the summons in Chancery

issued in Said Cause which Summons order
and attachment in equity bear this date,
and are made returnable on the first
Monday in October next that being October
rules and are directed to the Sheriff of
Lee County. Now therefore if the Said
James M. Wheeler & Moses S. Ball merchants
and partners as aforesaid shall pay or
Cause to be paid to the Said Charles Byton
and William M. Swap or either of them all
Costs and Damages that may be awarded
against them or sustained by any person
by reason of their suing out the Said
attachment in equity then the above obli-
gation to be void otherwise to remain in
full force and virtue.

J. M. Wheeler Seal
M. S. Ball Seal
J. Gibson Seal
Seal

(2) - 1
Wheeler & Ball
vs. attachment Bonds
Payton & Swaff
& others

July 19/1875

Virginia Lee County to wit;

To the Sheriff or any Constable of Lee County:

Whereas James M. Wheeler and Moses S. Ball merchants and partners in trade under the firm name and Style of Wheeler and Ball have this day instituted a suit in equity in the Circuit Court of Lee County Virginia against Charles Peyton and William W. Swap, and the said Charles Peyton and William W. Swap partners in the trade and business of making iron and castings under the firm name and style of Peyton & Swap and Presley A. Howard Edwin Demortimer, Paul C. Bedford William G. Newlee administrator of the estate of John G. Newlee deceased in the State of Tennessee and Thomas S. Ely Sheriff of Lee County and as such administrator of the estate of John G. Newlee deceased in Lee County Virginia and said William G. Newlee and Dr. John W. Divine and Adaline Divine his wife and Jacob Slaughter and Eugenia Slaughter his wife heirs of John G. Newlee deceased and William G. Brown and Alexander L. Greer for a debt of \$3316.79 due on the 18th day of June 1875 ^{which suit in equity is pending in the Circuit Court of Lee County} and the Complainants having this day ~~executed~~ ^{made} filed with me in my office an affidavit ~~stating~~ ^{made by themselves} on oath ^{before} stating that ^{a justice of the peace in and for Lee County} their claim and debt sued for amounts to \$3316.79 and bears interest from the 18th day of June 1875 till paid on which day it became due and payable and that the

Said Debt and Claim is just and unpaid and there is present Cause of action and Suit therefor and that the Defendants Charles Peyton and William M. Swap and the Said Charles Peyton and William M. Swap partners in the Trade and Business of making iron and Castings under the firm name and Style of Peyton and Swap and Presley A. Howard, Paul C. Bedford William G. Newlee administrator of the estate of John G. Newlee deceased in the State of Tennessee and the Said William G. Newlee Dr. John M. Divine and Adaline Divine his wife, and Jacob Slaughter and Eugenia Slaughter his wife Heirs of John G. Newlee deceased and Alexander L. Greer are all not residents of this State and that they further believe the Said nonresident Defendants have estates and debts due them within the County of Lee in which this Suit of equity is, and that they are sued in this Suit in equity with Thomas S. Ely Sheriff of Lee County and as such administrator of the estate of John G. Newlee deceased in Lee County Virginia and William G. Brown who are both defendants in this Suit and who both reside in Lee County where the Suit is:

There are therefore ^{in the name of the Commonwealth of Virginia} to require you to attach the estates of the Said Defendants Charles Peyton and William M. Swap and the Said Charles Peyton

and William M. Swap partners in the Trade and Business of making iron and Castings under the firm name and Style of Peyton & Swap and Presley A. Howard, Paul C. Bedford William G. Newlee administrator of the estate of John G. Newlee deceased in the State of Tennessee and the Said William G. Newlee Dr. John M. Divine and Adaline Divine his wife and Jacob Slaughter and Eugenia Slaughter his wife Heirs of John G. Newlee deceased and Alexander L. Greer for the Said amount of principal money with interest thereon as aforesaid and such estate so attached in your hands to secure and so to provide that the same may be forthcoming and liable to further proceedings thereupon to be had before the Circuit Court of Lee County Virginia at the next ^{August} ~~September~~ term thereof 1875 and that you then and there have this attachment and make return to Said Court how you have executed the same. Given under my hand at the Courthouse of Said County the ~~the~~ 19th day of July 1875. in the 100th year of the Commonwealth.

James W. Ornelk

(3)
Wheeler & Ball

vs. } attachment

Payton & Swaps
& others

To November Term 1875

I executed the within attachment by levying the same on the Defendant Charles Payton and Payton & Swaps lease of the iron works land at and near Cumberland Gap in Lee County Virginia which includes the iron works furnace water Blast Blower and appurtenances and by levying also on all the real estate owned by the within named non-resident Defendants which lies in Lee County Virginia at and near Cumberland Gap in said County and include all the Wood that in the Lewis Haller and all the things that belong to the furnace and cinders
this July 26 1875
E. J. Woodward C. J. C.

Bond has this day been given on the within attachment by James M. Wheeler and Moses S. Ball with Zach. S. Gibson and David C. Willis as their Securities in the Penalty of Seven thousand Dollars Conditioned according to law. Given under my hand this the 19th day of July 1875, which bond is approved by me.

James W. Orr, Clerk.

The Commonwealth of Virginia:

To the Sheriff of Lee County Greeting:

We Command You in the name of the Commonwealth of Virginia to Summon Charles Peyton and William W. Swaff and the Said Charles Peyton and William W. Swaff partners in the trade and business of making iron and Castings under the firm name and Style of Peyton & Swaff, and Presley A. Howard Edwin Demortimer, Paul C. Bedford, William G. Newlee administrator of the estate of John G. Newlee deceased in the State of Tennessee and Thomas S. Ely Sheriff of Lee County and as such Administrator of the estate of John G. Newlee deceased in Lee County Virginia and Said William G. Newlee Dr. John W. Divine and Adaline Divine his wife and Jacob Slaughter and Eugenia Slaughter his wife heirs of John G. Newlee deceased and William G. Brown and Alexander L. Greer to appear before the Judge of the Circuit Court of Lee County at the Courthouse, in the Clerks Office on the first Monday in October next that being October Rules next, to answer a bill in chancery exhibited in our Said Court against them by James M. Wheeler and Moses S. Ball Merchants and partners in trade under the firm name and Style of Wheeler & Ball, and have then there this writ.

Witness James W. Orr Clerk of our Said Court, at
the Courthouse this the 19th day of July 1875,
in the 100th year of the Commonwealth.

James W. Orr. clerk.

To the Sheriff of Lee County Greeting:

The proper affidavit required by law for an
attachment in Equity having been made and
filed by the Complainants in the within Summons
in Chancery and in this Suit, who required an
attachment in equity to be issued, and the ne-
cessary order to be endorsed thereon, therefore
the officer to whom this Summons in Chancery is
directed is hereby ordered to attach the real
and personal estates belonging to the within na-
med nonresident Defendants to wit Charles
Peyton and William W. Swap and especially
to attach the debts and liabilities due or to
become due by and from the within named
Defendants Presley A. Howard, Edwin Demortimer
Paul C. Bedford and the Said Administrator
and Heirs of John G. Newlee deceased or
any of them to the Said Defendants Charles Peyton
and William W. Swap or either of them or to them
or either of them as members of the firm of
Peyton and Swap and also to attach any
other estates belonging to Said Charles Peyton

and William W. Swap or either of them or to
them or either of them as members of the firm
of Peyton and Swap whether in their own
hands or the hands of the other defendants
and such estates and debts and debts and
liabilities so attached in your hands to secure
and so to provide that the same may be forth-
coming and liable and subject to further orders
of the Circuit Court of Lee County and further
proceedings thereupon to be had before the Circuit
Court thereof, and the Defendants Presley A. Howard
Edwin Demortimer and Paul C. Bedford and
the Administrator and Heirs of John G. Newlee
deceased are hereby restrained and prohibited
from paying any part of the debts and lia-
bilities due or to become due from them or
either of them to the Defendants Charles Peyton
and William W. Swap or either of them or to the
firm of Peyton and Swap or to any other persons.
And that you the Sheriff of Lee County will re-
turn this order and attachment in equity before
the Judge of the Circuit Court of Lee County at
the Courthouse in the Clerks office on the first
Monday in October next that being October Rules
next, together with how you have executed
the same. This the 19th day of July 1875.
and the 100th year of the Comlth. James W. Orr. clerk.

I hereby accept the legal service of the within
summons in Chancery order and attachment in
equity on the 19th day July 1875 immediately
after the state of John G. Newlee was committed to me
as Sheriff of Lee County

The 13th day

and return of the value of
John G. Newlee New

Wheeler & Ball

Summons in Chy.

and
attachment in Equity.

Payton & Swap
& others

Returnable to October 1875.

I have this day executed the within
attachment in equity and summons
in Chancery with the order
and attachment endorsed
thereon I am myself as admin-
istrator of the estate of John
G. Newlee deceased the ac-
cepting the legal service of
the same. This July 19th 1875.

The S. Ely S. L. Co.
and adm. of John G. Newlee

#

Virginia Lee County to wit:

This day Edward L. Woodard personally appeared be-
fore me the undersigned a Justice of Lee County
and made oath that on the 26th day of July
1875 he delivered true copies of the within summons
and attachment in equity to Charles Payton and
William M. Swap and William Newlee and to Laura
A. Newlee for Mrs. Slaughter she being a white member
of her family ^{English} over 16 years of age explaining
it to her Mrs. Slaughter being not found at her
usual place of abode. Given under my hand this

The S. Ely S. L. Co.

The within attachment in equity is executed by
levying the same on the unexpired lease of the
iron works property and real estate at and
near Cumberland gap in Lee County this lease
hereby attached and levied on is the real estate &
and iron works & leased and rented to Charles Payton
by Prasley C. Howard Paul C. Bedford Edwin Samor-
tiner and John G. Newlee under a Contract with
them including the machinery at the furnace
and foundry and including the water blast
blower and all the fixtures thereto, also
about 75 moulding flasks also about 100
Cords of wood in the Lewis Hollow also about
300 bushels of Coal all of which I have this
day attached and levied on by virtue of
this attachment in equity on this the 10th
day of August 1875.

Bond is given by the plaintiffs in the
within attachment with J. S. Gilman
and as securities in the pen-
alty of seven thousand dollars on this
the 10th day of July 1875.
James W. Orr clk.

Whellor & Ball
against

Defts.

} Exceptions
to Commissioners
Report

Peyton and Swap & others Defts.

1 The Plaintiffs by their Counsel hereby except to Commissioner Morgans report upon the grounds that he allows Defts. to set up a defence and take evidence as to matters not set up in any pleadings the Defts none of them having filed any answer.

2 And upon the further grounds that said Comm. allows them to set up a claim for unliquidated damages against the claim of Charles Peyton as it cannot be either a legal or equitable offset to his claim. his claim being for improvements put upon the land & the claim attempted to be set up as an off^{set} being unliquidated damages.

3 And upon the further grounds that the plaintiffs have seized upon the claim of Charles Peyton by an attachment and then it could not afterwards be offsetted by unliquidated damages or any other sort of a claim.

4 And upon the further grounds that the claim for unliquidated damages attempted to be set up as an offset is a claim if due at all is due in a different right. The claim attempted to be recovered by Whellor & Ball is a claim due Charles Peyton ^{alone} for improvements which has never been assigned and which is due

under the written Contract of lease filed
in the Cause And the Claim of unliqui-
dated Damages attempted to be Set up
~~at all~~ is due if it is due at all from
the firm of Peyton & Swap,

5. And upon the further Grounds that if
the the Defendants Newlee, Howard, Bedford
& Demortimer had any Claim against
the other defendants they must first
get a judgment at law for it and
then Set it up as an offset or proceed
to Set it up by an independent Suit or
Cross Bill.

Miller for
Plaintiffs

(14) #
Wheeler & Ball
vs.
Executors
of Lewis
Report.
Peyton and
Swap & others

Virginia.

In the clerks office of the Circuit Court of Lee County
on the 28th day of September 1875,
Wheeler & Ball Plaintiffs

against

Plaintiffs

In chancery.

Charles Peyton & Wm W Snaph et als Defendants

The object of this suit is to recover of the defendants Charles Peyton and Wm W Snaph the sum of \$3316.79 and interest thereon from June 18th 1875, till paid, which is due by a note executed by them to plaintiffs; and to subject their real and personal estates to the payment of the same, and especially to subject to the payment thereof any debts and liabilities due or to become due them or either of them from the defendants Presley A Howard, Edwin Demortimer and the administrators and heirs of John C. Neulee deceased, or any of them; and to subject all their real and personal property, including the Mills, iron works property, furnace, foundry, water blast, and other appurtenances, at and near Cumberland Gap in Lee County Va, to the payment of the same, to the extent of their liabilities to said Peyton & Snaph, all of which real and personal property, debts and liabilities have been attached and levied on by attachments issued in this cause. And it appearing from an affidavit filed in the cause that the defendants Charles Peyton, Wm W Snaph, Presley A Howard, Paul C Bedford, Wm H Neulee Administrator of John C. Neulee died in Tennessee, and the said Wm H Neulee John W Dirvine & Adaline Dirvine his wife, Jacob Slaughter & Eugenia Slaughter his wife and Alexander L Greer are nonresidents of the State of Virginia. It is therefore ordered that they appear here within one month after due publication of this order, and do what is necessary to protect their ^{interests} in this suit.

A copy

Teste James W Orr, clerk.

I certify that on Monday the first day of the October Term 1875 of the

County Court for Lee County. I posted a copy of the above order at
the front door of the Court House of said County,
Cycnew under my hand. October 1848.

James W Orr. Clerk.

Wheeler & Ball

Order Pub.

Peyton & Sinaf et als.

Copy to Lee County Sentinel
Sept 29th 1875.

James W Orr. Clerk.

(4)

To William H. Newlee administrator of the estate
of John G. Newlee deceased in the State of Ten-
nessee and Thomas S. Ely Sheriff of Lee County
Virginia and as Such Administrator of the estate
of John G. Newlee deceased in Lee County Virginia
and the Said William H. Newlee John W. Divine
and Adaline Divine his wife and Jacob Slaughter
and Eugenia Slaughter his wife heirs at law
of John G. Newlee deceased and Presley A.
Howard Paul C. Bedford and Edwin De-
mortimer.

Gentlemen and Ladies, You will please
take notice that Charles Peyton my Decedent
having used and tested the iron works prop-
erty H.C. for Over Two years which was
leased and rented to him on the 10th day
of September 1872 by Presley A. Howard
Edwin Demortimer Paul C. Bedford and
John G. Newlee deceased by a written
Contract of lease which Iron works
property H.C. lies near Cumberland Gap

in Virginia & Tennessee and Charles Peyton
deceased having fully ascertained that Said
Iron works property &c. will not pay expenses
and not pay sufficiently to justify him in
continuing to run the same for the term
of five years and pursuant to Said Contract
I hereby give you this written notice that
it is my intention to Cease operations and sur-
render the possession of the leased premises
to you after sixty days from this date
and that I require you to pay me for
the improvements made to the machinery
and for all buildings which are of a
permanent character made to and on
the leased premises and for any materials
for manufacturing iron which are then
on hand and I further require you
to make a settlement with me in accord-
ance with the terms of Said Contract of
lease by choosing an arbitrator to act jointly
with one to be chosen by me and their
umpire and finally to make a full settle-
ment and payment pursuant to Said

Contract of lease and I hereby choose and
select Wm. Hoskins of Lee County Virginia
as my arbitrator according to Said Contract,
This January 20th 1876,

Wm. A. Orr Admr. of the
Estate of Charles Peyton deceased

Virginia Lee County to wit:

This day Job A. Snively personally ap-
peared before me the undersigned a Justice of
the peace in and for Lee County Va. and made
oath that he delivered true copies of the
above notice to William H. Newlee John
+ Alline Devine his wife
Mr. Devine his wife + Jacob Slaughter + Emeline Slaughter
who are a part of the parties to whom it
was directed. Given under my hand
this the 1st day of April 1876.

James M. Pugh J. P.

11071

Wheeler & Ball

vs. } notice,

Pyton & Swart &
others

April 1st 1876

Commissioner's Office,

Jonesville, Va., *April 24* 1877.

Wheeler & Ball _____
AGAINST

Plaintiff, }
Defendant, }

IN CHANCERY.

Payton & Swaff & al

The parties to this suit, and all others interested are hereby notified, that at my office. in Jonesville, on the *first* day of *May* 1877, I will proceed to execute a decree of the Circuit Court of Lee county, entered in the above styled cause, on the *6th* day of *Septm* 1876, (of its terms and requirements the parties are required to take notice and act accordingly), at which time and place all parties interested are required to appear and to produce and bring with them all necessary papers and such witnesses as they may desire to introduce touching any matter about which oral testimony may be desired.

HENRY J. MORGAN, *Com'r.*

Wheeler & Bull

Dr. Notice May 1/77

Payton & Swafford

On the 24th day of
April 1877 I deposited
in the Post office at
Jonesville copies of the
within to William Wheeler
at Cumberland Gap &
Ball & Wheeler at
Walnut Hill

H. J. Mergens

Entered by delivering to
Thos. S. Ely a copy of the within
notice. Apl. 28th 1877

Thos. S. Ely D.S.
for Thos. S. Ely S.L.C.

First

To William H. Newlee Administrator of the
estate of John G. Newlee deceased in the State
of Tennessee and Thomas S. Ely Sheriff of Lee
County Va. And as such administrator of the
estate of John G. Newlee deceased in Lee County
Virginia and the Said William H. Newlee John
M. Divine and Adaline Divine his wife and
Jacob Slaughter and Eugenia Slaughter
his wife heirs at law of John G. Newlee
deceased and Presley A. Howard Paul C.
Bedford and Edwin De Mortimer.

Gentlemen and ladies:

You will please take notice that Charles
Pyton my decedent having used and ~~tested~~
the iron works property &c. for over two
years which was leased and rented to him
on the 10th day of September 1872 by Presley
A. Howard Edwin De Mortimer, Paul C. Bedford
and John G. Newlee deceased by a written
Contract of lease which Iron works property
&c. lie near Cumberland Gap in Virginia
and Tennessee and the Said Charles Pyton
deceased having fully ascertained that Said
Iron works property &c. will not pay expenses
and ~~will~~ ^{would} not pay sufficiently to justify
him in continuing to run the same for the
term of five years and pursuant to Said
Contract I hereby give you this written notice.

that it is my intention to Cease operations
and Surrender the possession of the leased prem-
ises to you after Sixty days from this date
and that I require you to pay me for
the improvements made to the machinery
and for all buildings which are erected
which are of a permanent Character and
for all materials for manufacturing iron
which are then on hand and I further
require you to make a Settlement with
me in accordance with the Terms of Said
Contract of lease by Choosing an arbi-
trator to act jointly with one to be Chosen
by me ^{and I hereby Choose William Hosking as my arbitrator} and their umpire, and finally to
make a full Settlement And payment
pursuant to Said Contract of lease.

Given under my hand this the 20th day
of January 1876.

Wm. F. Orr administrator of
the estate of Charles Peyton decd.

10
Wheeler & Ball

vs. Notice

13
Peyton & Swap & others

I hereby accept the legal
Service of this notice on this
the 24th day of January 1876.

Thos. S. Taly
Sheriff of Lee County Va.
and Admr. of the estate
of John G. Newsee decd.

Filed Jan'y 24th 1876.

James W. Orr, Clerk.

To William H. Newlee administrator of the estate
of John G. Newlee deceased in the State of
Tennessee and Thomas S. Ely Sheriff of Lee County
Virginia and as such Administrator of the estate
of John G. Newlee deceased in Lee County Virginia
and the said William H. Newlee John W. Divine
and Adaline Divine his wife and Jacob Slaughter
and Eugenia Slaughter his wife heirs at law
of John G. Newlee deceased and Presley A.
Howard Paul C. Bedford and Edwin De-
Mortimer.

Gentlemen & Ladies, You will please
take notice that Charles Peyton my Decedent
having used and tilled the iron works property &c.
for over two years which was leased and rented
to him on the 10th day of September 1872 by
Presley A. Howard Edwin DeMortimer Paul
C. Bedford and John G. Newlee deceased by
a written Contract of lease which Iron works
property &c. lies near Cumberland Gap in
Virginia and Tennessee and said Charles
Peyton deceased having fully ascertained that
said Iron works property &c. will not pay
expenses and ~~will~~^{would} not pay sufficiently ~~and~~
to justify him in continuing to run the same
for the term of five years and pursuant to said
Contract I hereby give you this written notice
that it is my intention to cease operations

and Surrender the possession of the leased premises to
you after Sixty days from this date and that
I require you to pay me for the improvements
made to the machinery and for all buildings
which are of a permanent character made to
and on the leased premises and for any ma-
terials for manufacturing iron which are then
on hand and I further require you to
make a settlement with me in accordance
with the terms of said Contract of lease by
choosing an arbitrator to act jointly with
one to be chosen by me and their umpire
and finally to make a full settlement and
payment pursuant to said Contract of lease.
And I hereby choose and select ~~Wm~~
Hoskins of Lee County Virginia as my
arbitrator according to said Contract.

This January 20th 1876.

Wm. A. Orr Admr. of the
Estate of Charles Peyton decd.

State of Kentucky Montgomery County to wit:
This day W^m S. McKissick personally appeared
before me the undersigned a Justice of the Peace
in and for Montgomery County Kentucky and
made oath that on the 28th day of February
1876 he delivered true Copies of the above notice
to Presley A. Howard and Paul C. Bedford two
of the persons to whom it was directed.

Given under my hand this the 4th day of
March 1876. A. DeBord J. P.

Justice of the Peace in
and for Montgomery County
Kentucky.

State of Kentucky

Montgomery County to wit:

I the undersigned Clerk of the Cir-
cuit Court of Montgomery County Kentucky which
is a Court of record having an official Seal
do hereby Certify that R. DeBord whose
name is signed to the foregoing Certificate is and
was at the date thereof an acting Justice of the
Peace in and for Montgomery County Kentucky
and that he is authorized as such to administer
oaths and affidavits under the laws of Kentucky and
that his Signature thereto is genuine and that full
faith and Credit should be given to the same.
Witness my hand and official Seal on this the 4th day
of March 1876. R. Mitchell Clerk of Circuit
Court of Mont
gomery County
Kentucky

Instructions how to execute this notice.

Any intelligent person who can read writing can execute this notice by delivering to Presley A. Howard the Copy marked for him and by delivering to Paul C. Bedford the Copy marked for him and then the person delivering the Copies to Howard and Bedford will go before a Justice of the Peace of Montgomery County and make oath of the fact and the Justice will fill up the blanks ⁱⁿ and sign his Certificate and the person executing the notice will then take this paper to the Clerk of the Circuit Court of Montgomery County and the Clerk will fill ^{the} blanks in and sign his Certificate and put his official Seal thereto and then the paper thus prepared will be mailed to me at Jonesville Lee County Virginia

David Miller

(10X)

March 1870

Wheeler & Bone

Original

Notice

Copy on Dupr
& Office

This paper is
to be executed
by delivering
Copies of the
same and when
the Certificate
is completed
it will be
mailed to

David Miller
Jonesville
Lee County
Virginia

Cost of executing
this notice and
affixing Seal Certificate
\$2.50
See Statement within

18 ct

The Commonwealth of Virginia:

To The Sheriff of Lee County:—Greeting.

WE COMMAND YOU TO SUMMON *Wm. A. Orr* Administrator
of the estate of *Charles Peyton* deceased

to appear before the Judge of the *Circuit* Court of Lee County, at the Court-house, in the

Clerk's Office, *At February*
hibited in our said Court against

Rules next, to answer a bill in chancery, ex-

Wm. W. Swain & others and *an* amended *bill* *do* as to be against the
Said *Wm. A. Orr* as administrator of the estate of *the said*
Charles Peyton deceased by *James M. Wheeler and Moses*
S. Ball merchants and partners in trade under the firm
name and style of *Wheeler and Ball*

And have then there this writ. Witness, JAMES W. ORR, Clerk of our said Court, at the
Court-house, this *24th* day of *January*, 1876, in the *100th* year of the Commonwealth.

John R. Gibson D.C.

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Wheeler & Ball

vs. } Simmons

Peyton Swap
& others

Felby Rules, 1876.

I accept legal service
of the within. Summons
this January 24th 1876.

W. T. Orr, administrator of
the estate of
Charles Peyton, died.

I hereby certify that an order
of publication in the case of Whelan
& Ball vs. Chas. Peyton & Wm. W. Swap
et als. of which annexed is a copy,
has printed four times successively, ending
Oct. 22nd, 1875 in the Lee County Sun-
timel, a weekly news paper publisher
in the Commonwealth of Virginia.
Chas. Willoughby
Clerk. Continued.

VIRGINIA:—In the Clerk's office of
the Circuit Court of Lee county, on the
28th day of September, 1875.
WHELAN & BALL, Plaintiffs.

CHAS. PEYTON & Wm. W. SWAP, et als.
DEFENDANTS.

IN CHANCERY.

The object of this suit is to recover of the
defendants, Charles Peyton and Wm. W.
Swap the sum of \$3,316.79 and interest there-
on from June 15th, 1875 till paid, which is due
by a note executed by them to plaintiffs; and
to subject their real and personal estates to
the payment of the same, and especially to
subject to the payment thereof any debts and
liabilities due or to become due them, or either
of them, from the defendants Presley A.
Howard, Edwin Deaconmire, and the admin-
istrators and heirs of John G. Newlee, decd.,
or any of them; and to subject all their real
and personal property, including the mills,
iron-works property, furniture, foundry, water-
blast, and other appurtenances at, and near
Chamberland Gap, in Lee county, Va., to the
payment of the same, to the extent of their li-
abilities to said Peyton and Swap, all of which
real and personal property, debts and liabil-
ities have been attached and levied on by at-
tachments issued in this cause. And it ap-
pearing from an affidavit filed in the cause that
the defendants, Charles Peyton, Wm. W.
Swap, Presley A. Howard, Paul C. Bedford,
Wm. H. Newlee, Administrator of John G. Newlee,
decd., in Tennessee, and the said Wm. H.
Newlee, John W. Lyne and Adaline Divine,
his wife, Jacob Slaughtler and Eugenia Slaught-
ler, his wife, and Alexander L. Greer are non-
residents of the State of Virginia. It is there-
fore ordered that they appear here within one
month after due publication of this order, and
do what is necessary to protect their interests
in this suit.

(6)
Wheeler & Ball
Certificate of Pub
Ryton & Smap

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